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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELECTRIC ENGINEERING COMPANY,

Petitioner,

vs.

CALPINE CORPORATION; WILLIAM B. BETCHART; ENERVEST CORPORATION and ENERVEST MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

ISSUE I

Whether the United States Court of Appeals for the Ninth Circuit erred in affirming Fed. R. Civ. P. 37(b)(2)(C), failure of discovery, terminating sanctions against Electrical Engineering Company and in favor of Calpine Corporation, William Betchart, Enervest Corporation, and Enervest Management Corporation; particularly when EEC had timely produced all documents requested by Calpine Corporation; also, when the Enervest entities, which never propounded any discovery, had the benefit of the production to Calpine Corporation?

ISSUE II

Whether the Ninth Circuit Court of Appeals erred in ruling that EEC's appeal was "frivolous" when it was clear that the result of the appeal was *not* obvious *nor* were EEC's arguments wholly without merit.

PARTIES TO THE PROCEEDING

1. Electric Engineering Company, ("EEC") — is wholly owned, has no parent companies or subsidiaries, and has issued no shares to the public.

2. Calpine Corporation, ("Calpine") — has two parent companies which have issued shares to the public: Electrowatt, Ltd., and CS Holdings.

3. Enervest Corporation and Enervest Management Corporation, ("Enervest") — are wholly owned, have no parent companies or subsidiaries, and have issued no shares to the public.

4. Valley Engineers, Inc., ("Valley") — has no interest in these proceedings due to a settlement agreement entered into by the parties.

5. Nugget Hydroelectric, L.P., ("Nugget") — has no interest in these proceedings due to a settlement agreement entered into by the parties.

6. Credit Suisse, a Swiss Corporation, ("CS") — has no interest in these proceedings due to a settlement agreement entered into by the parties.

7. Bruce Brown, ("Brown") — has no interest in these proceedings due to a settlement agreement entered into by the parties.

8. American Home Assurance Company, ("AHA") — is not a party to this Petition.

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2. *Valley Engineers Inc. v. American Home Assurance Co.*, 111 F.3d 139 (9th Cir. Apr. 17, 1997) — (prior appeal, dismissed for want of final judgment).

STATEMENT OF JURISDICTION

This Court's jurisdiction over this cause is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provision and federal rules of procedure are set out in their full text in the Appendix J:

United States Constitution Amendment V

Federal Rules of Appellate Procedure 38 — Damages for Delay

Federal Rules of Civil Procedure 6(a) — Time

Federal Rules of Civil Procedure 6(e) — Time

Federal Rules of Civil Procedure 37(b)(2)(C) — Failure to Make Disclosure or Cooperate in Discovery; Sanctions

Federal Rules of Civil Procedure 72(b) — Magistrate Judges; Pretrial Orders

Local Rules Of The District Court — Eastern District Of California Rule 304(b) — Magistrate Judges' Authority In Excepted Pretrial Matters

STATEMENT OF THE CASE

Electric Engineering Company, ("EEC"), contracted with Enervest Corporation to construct four small hydroelectric plants. Enervest Corporation then assigned the contract to Enervest Management Corporation, (hereinafter both Enervest entities shall be referred to as "Enervest"). The contract was subsequently reassigned to Nugget Hydroelectric, L.P., ("Nugget").

Credit Suisse, ("CS"), financed the projects and hired Calpine Corporation to monitor construction. William Betchart was Calpine's engineer assigned to the project. (Hereinafter Calpine Corporation and Betchart shall be referred to as "Calpine.") Valley Engineers Inc., ("Valley"), provided labor and materials.

Due to construction disputes and delays, Nugget, CS, and EEC entered into a "workout agreement" which required only one project to be built — the Deadwood Project.

In October, 1989, Nugget filed Chapter 11 bankruptcy.

EEC was terminated from the project on December 8, 1989.

On December 3, 1990, Valley filed a complaint in the Yuba County, California, Superior Court, Case No. 4787, against EEC and American Home Assurance Company, ("AHA"), EEC's bonding company. The suit claimed damages for labor and

materials provided. On January 2, 1991, the case was removed to the United States District Court for the Eastern District of California on the basis of diversity of citizenship.

On April 15, 1991, and by amendment on November 27, 1991, EEC filed counterclaims and cross-claims against Valley, Nugget, CS, Bruce Brown, Calpine, William Betchart, and AHA.

CS served interrogatories and first sets of requests for production on each EEC and AHA on July 8, 1991.

On July 9, 1991, Calpine also served EEC with a request for production of documents. EEC timely delivered to Calpine's attorney five boxes of original documents as a full and complete response to Calpine's request, which response included the notorious "Carroll Memo", (*see* below). Calpine's attorney claimed he never examined the documents because he had a Fed. R. Civ. P. 12(b) motion to dismiss pending, and he wanted to save on litigation expenses to his client. The motion to dismiss, which, in essence, claimed that EEC's complaint lacked an essential allegation — that it had a valid contractor's license — was granted with leave to amend. EEC amended its complaint, and Calpine remained in the case until its conclusion.

CS, in the meantime, moved to compel EEC's and AHA's responses to its discovery on November 27, 1991. That motion was granted by the District Court on December 20, 1991. In addition, the court entered sanctions against EEC and AHA on January 31, 1992.

On April 15, 1992, EEC served its Second Amended Complaint which added Enervest as third party defendants.

Discovery and discovery motions subsequently centered around a memorandum drafted by John Carroll, EEC's project

manager, (the "Carroll Memo"). The Carroll Memo was, at first blush, apparently damning to EEC's claims and was later dubbed a "smoking gun" by the Ninth Circuit. However, based upon other evidence available to the District Court, the Carroll Memo was not so damaging, and, after it was produced, no party ever attempted to use it as the basis of a motion for summary judgment.

Having discovered that the Carroll Memo was apparently missing from documents produced in response to its request, CS sought the appointment of a Special Master to review EEC's and AHA's documents. The request was denied. However, a subsequent CS motion to compel and for sanctions was considered at an evidentiary hearing on February 24 and 25, 1994. On March 16, 1994, the magistrate judge issued findings and recommendations that EEC's and AHA's claims and defenses as to CS and Bruce Brown be struck for discovery abuse.

On March 25, 1994, Calpine, and on March 30, 1994, Enervest each filed requests to modify the findings of the magistrate and to include them in the sanctions. EEC timely filed objections to the findings and responses to Calpine and Enervest's requests.

On April 22, 1994, per order of the District Court, a hearing was held before the magistrate judge on Calpine and Enervest's requests. The Magistrate's Findings and Recommendations, issued that same day, extended the previously recommended sanctions against EEC and AHA to include Calpine and Enervest. (Appendix F, p. 33a).

At the conclusion of the April 22 hearing, the following colloquy took place between the magistrate and counsel for EEC:

> THE COURT: Ms. Stepanovich, if not Rule 72, I believe a local rule ordinarily provides ten (10) days to object to such a recommendation. Will you require longer than that reasonably — will you reasonably require longer than that to take your objections, which I anticipate you will want to make, to Judge Garcia?
>
> MS. STEPANOVICH: Your Honor, in this case, I would request additional time.
>
> THE COURT: How much more time?
>
> MS. STEPANOVICH: I'd like ten (10) days more.
>
> THE COURT: Twenty days . . . .

Local rules in California set a ten (10) day period to file some response as ten "court" days, *i.e.*, excluding Saturdays, Sundays, and holidays. As a result of the above discourse, EEC's counsel believed the magistrate had granted her two periods of ten (10) court days to file objections to his Findings and Recommendations.

EEC filed its objections on May 20, 1994. The Objections included evidence that the Carroll Memo was not so damaging to EEC's claims as was previously thought. However, on June 24, 1994, the District Court refused to consider EEC's objections as being untimely filed and issued its order adopting the magistrate's findings. (Appendix H, p. 55a).

On January 31, 1995, the District Court granted CS, Valley, and Nugget's motion to dismiss with prejudice all of their claims against EEC.

EEC filed a notice of appeal on February 8, 1996, which appeal was briefed and heard on oral argument, (*see* Appendix I, p. 70a). However, that appeal was dismissed for want of a

final judgment. *Valley Engineers Inc. v. American Home Assurance*, 111 F.3d 139 (9th Cir. 1997).

The court entered Final Judgment on June 12, 1997. (Appendix D, p. 30a; E, p. 32a), and EEC timely appealed to the United States Court of Appeals for the Ninth Circuit.

On October 21, 1998, the Ninth Circuit filed an order which, *inter alia*, determined that EEC's appeal was frivolous and issued a show cause order. (Appendix C, p. 27a). However, the court failed to identify exactly what in EEC's appeal was deemed frivolous.

On October 26, 1998, the Ninth Circuit filed its opinion on EEC's appeal affirming the District Court. (Appendix A, p. 1a).

Subsequently, all issues between EEC and CS, Bruce Brown, Valley, and Nugget were resolved by a settlement agreement. (*See* Appendix B, p. 24a, 25a). Further, on December 14, 1998, the court found sanctions for a frivolous appeal to be justified as to Calpine and William Betchart, awarded attorneys' fees and double costs, and referred the matter to an appellate commissioner for recommendation as to the amount of fees. (Appendix B, p. 25a). The court stated that the award relates to this appeal and not the aforementioned interlocutory appeal. Further, the award is against EEC only, not its counsel.

This Petition for Writ of Certiorari to the United States Supreme Court is timely filed.

REASONS FOR GRANTING THE WRIT

EEC fully complied with Calpine's discovery request, including producing the elusive "Carroll Memorandum". Enervest never made any discovery request of EEC. Calpine and Enervest never sought any order to compel or for sanctions against EEC, nor did they have any reason to. Yet the District Court, and the Ninth Circuit by its affirmance, unjustly punished EEC with terminating sanctions as to Calpine, Betchart, and Enervest.

This Court must grant EEC's Petition for Writ of Certiorari on the grounds that the United States Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10(a).

I.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING FED. R. CIV. P. 37(b)(2)(C), FAILURE OF DISCOVERY, TERMINATING SANCTIONS AGAINST ELECTRICAL ENGINEERING COMPANY AND IN FAVOR OF CALPINE CORPORATION, WILLIAM BETCHART, ENERVEST CORPORATION, AND ENERVEST MANAGEMENT CORPORATION; PARTICULARLY WHEN EEC HAD TIMELY PRODUCED ALL DOCUMENTS REQUESTED BY CALPINE CORPORATION; ALSO, WHEN THE ENERVEST ENTITIES, WHICH NEVER PROPOUNDED ANY DISCOVERY, HAD THE BENEFIT OF THE PRODUCTION TO CALPINE CORPORATION.

The Ninth Circuit Court was obliged to review the District Court's imposition of sanctions against EEC for abuse of discretion. *Payne v. Exxon Corporation*, 121 F.3d 503 (9th Cir. 1997). Where the drastic sanctions of dismissal or default are imposed, the range of discretion is narrowed and the losing party's, *i.e.*, EEC's, noncompliance must be found to be due to willfulness, fault, or bad faith. *Payne*, 121 F.3d 503; *Henry v. Gill Industries*, 983 F.2d 943 (9th Cir. 1993); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985).

As regarding the terminating sanctions imposed by the District Court and affirmed by the Ninth Circuit against EEC in favor of Calpine, Betchart, and Enervest, the court abused its discretion, and the undisputed facts demonstrate that EEC's actions never met the standard of willfulness, fault or bad faith. (EEC does not challenge the Ninth Circuit's affirmance of sanctions as to CS because that matter, as set forth above, has been settled.) (Appendix B, p. 25a).

A. Undisputed Facts

The following facts, as they relate to Petitioner's argument, are undisputed:

a) Calpine served EEC with a request for production of documents on July 9, 1991.

b) EEC timely responded and produced all documents responsive to that request by delivering five (5) boxes of original documents to Calpine's attorney's office. (Appendix A, p. 14a; F, p. 36a).

c) ***EEC's production included the "Carroll Memo"***, (Appendix A, p. 14a; F, p. 36a), which was later deemed to be a "smoking gun", (although, as will be shown below, was actually not dispositive of EEC's claims).

d) Calpine's counsel retained those five boxes of original documents for "several months". (Appendix F, p. 36a).

e) However, Calpine's counsel never looked at the five boxes of documents during the entire time they were in his office; he had no associate, law clerk, paralegal, or secretary review the documents; nor did he have them photocopied. (Appendix A, p. 14a; F, p. 36a).

f) Calpine had a Fed. R. Civ. P. 12(b) Motion to Dismiss pending and its attorney claimed that because of this motion and to save on client expenses he did not review EEC's documents. (Appendix A, p. 14a; F, p. 36a).

g) The Motion to Dismiss was related to a technical error in EEC's pleadings which was subsequently corrected in an amended complaint. (Appendix A, p. 14a).

h) The five boxes of original documents were recovered by EEC's new counsel. (Appendix A, p. 14a; F, 36a).

i) Calpine never subsequently requested the return of the five boxes of documents produced in order to review them.

j) Enervest never served any discovery request upon EEC.

k) Enervest claims it anticipated sharing CS' discovery; however, Enervest could have easily shared discovery with Calpine. (For that matter, there is no reason CS could not have also shared discovery with Calpine.)

l) Neither Calpine nor Enervest ever filed a motion to compel or a motion for sanctions against EEC, nor did they join in CS' motion for sanctions.

m) Subsequent to CS' motion to compel and for sanctions, EEC again retained new counsel who promptly produced the "Carroll Memo" to all parties. (Appendix A, p. 13a).

n) At no time did Calpine or Enervest complain of any document or documents missing from production, particularly not the "Carroll Memo" which *was* produced along with the initial response to Calpine's request. (Appendix A, p. 14a; F, p. 36a).

B. Unjust Punishment

Under this set of facts, the Ninth Circuit's affirmance can only be seen as an attempt to unjustly punish EEC for actions that pertained solely to its response to CS. (It is significant to keep in mind that, although it is not argued here, CS could have shared in the production served on Calpine which included the Carroll Memo. In that scenario, even the sanctions in favor of CS and the Court's discussion of bad faith may be suspect.)

This Court has ruled that generally any sanction under Fed. R. Civ. P. 37(b)(2) must be "just". *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 456 U.S. 694, 72 L. Ed. 2d 492; *see also* 8 Wright & Miller, *Federal Practice and Procedure*: Civil § 2283 (1970).

In the trilogy of *Hovey v. Elliott*, 17 S. Ct. 841, 167 U.S. 409, 42 L. Ed. 215 (1897); *Hammond Packing Co. v. Arkansas*, 29 S. Ct. 370, 212 U.S. 322, 53 L. Ed. 530 (1909), and *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 78 S. Ct. 1087, 357 U.S. 197, 2 L. Ed. 2d 1255 (1958), this Court developed the concept that there are constitutional limits upon the power of the courts to impose sanctions for failure to comply with judicial orders. Where that power is used merely to punish an offending party for contempt rather than to compel obedience to an order advancing ascertainment of truth, due process is denied. *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 517, n.1 (R.I. 1979).

The Ninth Circuit's affirmance of sanctions favoring Calpine, Betchart, and Enervest can be seen as nothing more than unjust punishment and a violation of EEC's due process rights. Especially is this true where EEC committed *no violation vis-a-vis* Calpine, Betchart, and Enervest.

Consider also the words of the Rhode Island Supreme Court which stated in *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 517 (R.I. 1979):

> We note that those state courts which have considered the question have held that a dismissal of a plaintiff's claim against defendants with respect to whom the plaintiff is not in breach of obligation or as to defendants who have not sought such relief

> is improper and unauthorized. *Wurnitsch v. Nordvik*, 14 Cal.App.ed 679, 92 Cal.Rptr. 518 (1971); *McIntire & Quiros of Colorado, Inc. v. Westinghouse Credit Corp.*, Colo.App., 576 P.2d 1026 (1978); *Trustees of Carpenters v. Angel-Haus Condominium, Ltd.*, 36 Colo.App. 133, 535 P.2d 259 (1975); *Rock v. Antoine's Inc.*, 7 Storey 164, 57 Del. 164, 197 A.2d 737 (1964); *Fischer v. Mead Johnson Laboratories*, 41 A.D.2d 737, 341 N.Y.S.2d 257 (1973); *Wernick v. Leo-Mac Builders, Inc.*, 31 Misc.2d 171, 220 N.Y.S.2d 393 (1961); *Tiger v. Spoonmore*, 160 Okl. 188, 16 P.2d 576 (1932); 27 C.J.S. *Dismissal and Nonsuit* §52 at 398. We find the foregoing authorities persuasive.

Further, as Maine's United States District Court judge stated,

> [T]he most severe sanction of dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence. That has not been shown to be the case here.

Northern Assurance Co. v. Ware, 145 F.R.D. 281 (D. Me. 1993).

Nor has it been shown in the case presently before this Court.

C. Calpine's Neglect

It is difficult to believe that an attorney would fail to review documents responsive to his own request for production on the misguided belief that a motion to dismiss based on technical pleading matters would be dispositive of his client's

involvement in the case. Certainly he would anticipate an amended complaint correcting any alleged error in pleading, particularly when the dismissal is with leave to amend.

On March 14, 1997, it appeared clear to the Ninth Circuit panel, (in an appeal that was subsequently deemed premature), that Calpine had the opportunity to review all the documents but didn't take it. (Appendix I, pp. 83a-99a). In fact, the court seemed impressed by the absurdity of the result of EEC being sanctioned for having complied with discovery to Calpine. (Appendix I, pp. 85a-88a).

In *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997), the Ninth Circuit addressed what it called a question of first impression in which a District Court had entered terminating sanctions against a plaintiff, Lowe, for discovery noncompliance in favor of a party, VECO, for which no outstanding discovery requests were pending. In affirming the dismissal of Lowe's claim, the Court stated:

> [W]e also conclude that the district court did not abuse its discretion by dismissing the claim against VECO. VECO brought its own successful motion to compel early in the discovery process, cooperated in Exxon's later efforts to secure adequate responses, and joined in Exxon's final motion to dismiss. The district court could reasonably conclude that plaintiffs' failure to comply with court orders prejudiced both parties.

As is clear from the court's statement, VECO was actively involved in the discovery process on its own and in cooperation with Exxon.

Not so in our case. Here, Calpine propounded its own discovery which was responded to. After that, neither Calpine

nor Enervest played any active role in the discovery process, not until terminating sanctions had already been entered in favor of CS.

In fact, had Calpine done its job properly, then it would have reviewed the five boxes of original documents delivered to it early on and shared the discovery with Enervest and CS. If that had occurred, there would have been no basis for entering terminating sanctions in favor of CS in the first place.

D. The Five Factors

In all of the findings and recommendations of the magistrate and the orders of the District Court, the imposition of terminating sanctions on EEC in favor of Calpine, Betchart, and Enervest, is based solely upon EEC's relationship to CS' request for production. At the very least, the Ninth Circuit should have given review of the extension of CS' sanctions to Calpine, Betchart, and Enervest by independently weighing the same five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Adriana International Corporation v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990); *Malone v. United States Postal Service*, 833 F.2d 128 (9th Cir. 1987). "Where a court order is violated, the first two factors support sanctions and the fourth factor cuts against a default. Therefore, it is the third and fifth factors that are decisive." *Adriana*, 913 F.2d at 1412.

In the present case, there was no violation of a court order as to Calpine, Betchart, and Enervest. Therefore, factors one and two, the public's interest and the court's ability to manage its docket, cannot be resolved against EEC. The fourth factor,

public policy favoring disposition of cases on their merits supports EEC's Petition.

As to the third factor, the risk of prejudice to Calpine, Betchart, and Enervest — it would be an absurd implication of law to assume prejudice to these parties when all their discovery requests had been satisfied, and the only prejudice they might suffer would be due to their own lack of diligence.

The fifth factor, availability of less drastic sanctions — such was not even considered in this case. Calpine, Betchart, and Enervest's sanctions rode on the coattails of those granted CS with no independent evaluation of lesser sanctions. In truth, it would be difficult to imagine what lesser sanctions could have been imposed inasmuch as EEC had committed no wrong as to these parties.

E. The Notorious Carroll Memo

Finally, it should be pointed out to this Court that the Carroll Memo, which the Ninth Circuit stated "belies" EEC's claims, was not as devastating as all that. In fact, EEC's Objections To The Magistrates Findings And Recommendations included evidence that the Carroll memo was of no great significance and certainly not dispositive of its case. (As discussed in Issue II, below, the District Court wrongfully rejected EEC's objections as untimely filed.)

The Carroll Memo, prepared by the project manager whose job it is, by the way, to worry about all the negative possibilities that may happen on a job, indicated that in his estimation EEC could not possibly complete the Deadwood Project within the budget set forth in the "workout agreement" due to problems with penstock costs.

Although Carroll's concerns may have been a factor, EEC was faced with much more serious problems. For example, project costs were escalating due to unforeseen changes in the Forest

Service and Fish and Game Commission's laws and regulations. No one could have predicted these costs and obstacles at the time the "workout agreement" was signed.

Even more damaging, however, was the conspiratorial activities of EEC's cross-, counter-, and third-party defendants as set forth in its second amended complaint. It is alleged there that the parties conspired to conceal Nugget's bankruptcy filing; offered financial incentives to EEC's managerial employees by promising to rehire employees at a higher wage if EEC's contract were terminated for the purpose of inducing EEC's employees to strike; threatening EEC's employees with violence or reprisals if they reported to work; and encouraging third persons without valid claims to make claims against the payment bond issued by EEC's surety, AHA.

EEC's Second Amended Complaint sought damages for intentional/negligent interference with EEC's contractual relations with Nugget, (Counts I and II); interference with EEC's laborers and field staff contracts, (Count III); and negligent supervision of CS and Calpine's employees, agents, and representatives on the job, (Count V).

None of these claims had anything to do with the concerns expressed in the Carroll Memo. Thus, the major portion of EEC's claims were not at all related to the particular claim at issue in the district court's order to provide discovery to CS. Not only were sanctions improperly imposed on EEC, *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985), but certainly it was an abuse of discretion to extend those sanctions to favor Calpine, Betchart, and Enervest.

> We have found the element of prejudice to be essential, stating that sanctions which interfere with the litigants' claim or defenses violate due process when they are imposed "merely for punishment of an infraction that did not threaten to interfere with the rightful decision

of the case." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983).

Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990). So, too, in this case where EEC complied with all of Calpine's discovery requests, it is a violation of due process to interfere with EEC's claims with unjust punishment for a *non*-infraction which *does not* threaten to interfere with the rightful decision of the case.

II.

THE NINTH CIRCUIT COURT OF APPEALS ERRED IN RULING THAT EEC'S APPEAL WAS "FRIVOLOUS" WHEN IT WAS CLEAR THAT THE RESULT OF THE APPEAL WAS *NOT* OBVIOUS *NOR* WERE EEC'S ARGUMENTS WHOLLY WITHOUT MERIT.

An appeal is considered frivolous if the result is obvious or the appellant's arguments are wholly without merit. *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58 (9th Cir. 1989).

This standard cannot be accurately said about EEC's appeal.

EEC raised three issues in its brief:

I. Did the District Court abuse its discretion in entering terminating sanctions against EEC in favor of CS and Bruce Brown?

II. Did the District Court abuse its discretion in entering terminating sanctions against EEC in favor of Calpine, Betchart, and Enervest?

III. Did the District Court abuse its discretion when it excluded EEC's objection to the Magistrate's Findings and Recommendations of April 22, 1994?

It is not clear from the Ninth Circuit's opinion or its orders exactly what the Court deemed frivolous about EEC's appeal. Therefore, we will examine each issue separately.

As to the first issue, based upon what has been argued as to Petitioner's first issue above, the fact that Calpine did, in fact, receive all its discovery including the Carroll Memo, and the fact that CS was certainly at liberty to share that discovery, the question of whether it was an abuse of discretion to enter terminating sanctions in favor of CS was not frivolous.

At the very least, it was a reasonable issue to determine whether such extreme sanctions were justifiable under the facts of this case.

Nonetheless, it cannot be said that the result of the appeal on this issue to the Ninth Circuit was obvious or that the arguments raised by EEC were wholly without merit.

As to the second issue, again based upon what has been argued as to Petitioner's first issue above, the result of this appeal was not obvious, nor were EEC's arguments wholly without merit. In fact, the Ninth Circuit itself apparently saw great merit in this argument when it first examined this issue. (*See* Appendix I).

Finally, as to the third issue, excluding EEC's objections to the Magistrate's Findings and Recommendations of April 22, 1994, the question rests solely on the reasonableness of EEC's counsel's understanding of her discussion with the magistrate regarding an extension of time for filing the objections.

As set forth above, that discussion was as follows:

> THE COURT: Ms. Stepanovich, if not Rule 72, I believe a local rule ordinarily provides ten (10) days to object to such a recommendation. Will you require longer than that reasonably — will you reasonably require longer than that to take your objections, which I anticipate you will want to make, to Judge Garcia?
>
> MS. STEPANOVICH: Your Honor, in this case, I would request additional time.
>
> THE COURT: How much more time?
>
> MS. STEPANOVICH: I'd like ten (10) days more.
>
> THE COURT: Twenty days . . . .

Local Rule 304(b) of the District Court of the Eastern District of California gives a party ten (10) days to file objections to a magistrate's proposed findings and recommendations. (Appendix J, p. 108a). Fed. R. Civ. P. 6(a) counts those days as ten "court" days, meaning excluding Saturdays, Sundays, and legal holidays. (Appendix J, p. 104a). Fed. R. Civ. P. 6(e) adds an additional three days after service by mail. (Appendix J, p. 105a).

According to the above rules, without any extension granted, EEC had a total of 17 days to file its objections to the magistrates proposed findings and recommendations. Both the magistrate and EEC's counsel knew and understood this.

EEC's counsel specifically requested "additional time" to file the objections. She specifically requested "10 days more", and the magistrate noted its approval by stating "20 days".

Under these circumstances, it was reasonable for EEC's counsel to conclude that the magistrate had granted her an additional period of ten (10) court days to file objections. Due to the fact that April 27, 1994, was a national day of mourning for President Nixon and the federal courts were closed, and since the counting period ended on a Sunday, this extension of time would have totalled to 34 actual calendar days making the objections due on May 26, 1994.

This is, in fact, what EEC's counsel understood from the discussion with the magistrate.

However, it would have been even more reasonable to assume that at the very least the magistrate had granted an additional ten (10) calendar days over and above the ten court days provided by the local rule. Again accounting for the national day of mourning and the counting period ending on a Sunday, that extension would have totalled to 31 actual calendar days making the objections due on May 23, 1994.

In fact, EEC filed its objections to the Magistrate's Proposed Findings and Recommendations of April 22, 1994, on May 20, 1994, well within this latter time period.

Had the magistrate not granted any extension at all, EEC's objections would have been due on May 12, 1994, (ten court days including the national day of mourning and three days for mailing).

If the time were calculated as 20 days, the objections would have been due on May 16, 1994.

What would not be reasonable would be to assume that in granting an additional ten (10) days to file its objections, the magistrate was in reality only granting EEC four (4) additional days, far from the "(10) days more" EEC's counsel had requested.

There is no evidence or suggestion whatsoever of unreasonableness or bad faith on the part of EEC's counsel in calculating the time for filing the objections.

Inasmuch as EEC presented arguments to the Ninth Circuit in its appeal that were not patently incorrect, there is no basis for a determination that the appeal was frivolous. *Hanna Boys Center v. Miller*, 853 F.2d 682 (9th Cir. 1988). The result of the appeal was never obvious, nor were EEC's arguments wholly without merit.

CONCLUSION

Based upon all the foregoing, the Petition for Writ of Certiorari should be granted; the United States Court of Appeals for the Ninth Circuit's ruling affirming sanctions against EEC and in favor of Calpine, Betchart, and Enervest should be reversed; and the United States Court of Appeals for the Ninth Circuit's order declaring EEC's appeal to be "frivolous" should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED OCTOBER 26, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VALLEY ENGINEERS INC.; NUGGET HYDROELECTRIC, L.P.,
Plaintiffs,

v.

ELECTRIC ENGINEERING COMPANY,
Defendant-Counter-Claimant-Cross-Claimant-Appellant,

CREDIT SUISSE, a Swiss Corporation,
Counter-Defendant-Counter-Claimant-Appellee,

BRUCE BROWN; CALPINE CORPORATION; WILLIAM B. BETCHART,
Counter-Defendants-Appellees,

and

AMERICAN HOME INSURANCE COMPANY,
Counter-Defendant,

v.

ENERVEST CORPORATION, a Colorado Corporation; ENERVEST MANAGEMENT CORPORATION, a Colorado Corporation,
Third-Party-Defendants-Appellees.

No. 97-16383

D.C. No. CV-91-00008-EJG

OPINION

Appendix A

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge Presiding

Argued and Submitted
June 10, 1998—San Francisco, California

Filed October 26, 1998

Before: J. Clifford Wallace, Thomas G. Nelson, and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

SUMMARY

Civil Litigation and Procedure/Discovery-Sanctions

The court of appeals affirmed a judgment of the district court. The court held that in a federal civil action, the sanction of dismissal of a claim is appropriate when a previously sanctioned litigant hides a "smoking gun" document during discovery and lies about it under oath.

John Carroll, a project manager for appellant Electric Engineering Company (EEC), wrote a memorandum to Francis Royer, EEC's president, and to the firm's attorneys stating that a contract to build a dam on Deadwood Creek had been fatally underbid. Carroll also said that another payday could be expected before financing would be withdrawn.

EEC failed to complete the project and was fired by appellee Nugget Hydroelectric, L.P., the principal. Litigation ensued involving the various entities that had been involved in the project, including claims by EEC alleging that cost overruns had been caused by others. A claim against Ameri-

can Home Insurance Company, EEC's surety, settled before trial.

Taking the lead for the defendants in discovery, appellee Credit Suisse had for three years attempted to obtain the Carroll memorandum through discovery. Carroll testified in a deposition that he did not recall writing the memorandum. David Bunim, American Home's lawyer, testified that he had deleted a substantive reference to the memorandum from a document when told by Douglas Noll, EEC's attorney, that no such memorandum existed. It appeared that American Home had also obliterated a damaging notation from a document it produced.

Royer testified that he had not seen Carroll's memorandum, but technical analysis showed that it had been faxed to EEC's attorneys from his machine. It also developed that an EEC lawyer had alluded to the memorandum in a latter to Royer.

The evidence showed that to reduce his client's litigation expenses, and in justified anticipation of winning a dispositive motion, the attorney for appellee Calpine Corporation had not read five boxes of materials produced six weeks earlier by EEC's current attorneys. He told one of EEC's attorneys (Rosenbaum) that he had not reviewed the papers in the boxes, which included the Carroll memorandum. Rosenbaum retrieved the material, knowing that Calpine's lawyer had not read the Carroll memorandum.

For more than two years, EEC's attorneys violated court orders to produce the Carroll memorandum. Several trial dates had to be vacated due to incomplete discovery. EEC received warnings and monetary sanctions, and continued to invoke attorney client privilege regarding discovery requests after it lost the privilege. Finally, EEC's newest attorneys produced the memorandum. In a second deposition, Carroll admitted that he had written the memorandum and sent it to Royer. Credit Suisse moved for case-dispositive sanctions.

Appendix A

A magistrate judge (MJ) found Bunim's testimony not credible, and ruled that American Home had waived its claim of privilege and acted in concert with EEC to hide evidence. The MJ concluded that both EEC's disobedience of the court's production order and the withholding of the Carroll memorandum had been willful. In the MJ's view, the Calpine production had been a "momentary lapse" in EEC's otherwise unremitting policy of suppression of the memorandum. The district court reached the same conclusion, and adopted the MJ's recommended sanction of dismissal.

With respect to EEC's claims against Calpine and appellee Enervest Corporation (Nugget's owner), the MJ found that they were essentially the same as those against Credit Suisse, and concluded that it would not be just to allow EEC to continue them against any other party.

On appeal, EEC contended that the findings of the MJ and the district court were clearly erroneous because the Carroll memorandum had been produced to Calpine, showing absence of willfulness; the memorandum was not so important that an inference of willfulness could be based on its nonproduction; and the nonproduction was the fault of American Home, which had managed the litigation for a while.

[1] The Carroll memorandum was a "smoking gun." It showed that the man who knew most about the project knew it could not be done as promised, had told the president of the company, and viewed the company's conduct as a way to have another payday before the plug was pulled. The memorandum established that obstacles to successful completion were known to EEC, and were not the result of interference by other participants. It was a fair inference that Carroll viewed the substance of the letter as especially important. Willfulness was a fair inference from the fact that the critical witnesses' testimony was not credible.

[2] Despite Calpine's lawyer having had possession of the Carroll memorandum for six weeks, Rosenbaum knew that

Calpine's lawyer had not seen the Carroll memorandum. In the context, production to Calpine did not show that the district court clearly erred in finding willfulness of its nonproduction to Credit Suisse. [3] Inclusion of the memorandum in the boxes delivered to Calpine's lawyer, but omission of it in subsequent EEC production, supported the inference that EEC deliberately withheld production from Credit Suisse. The "momentary lapse" in EEC's policy to suppress the memorandum implied that once the memorandum was in EEC's retrieved discovery materials, someone had to take the step of pulling it out.

[4] There was no reason to think that the omission of the Carroll memorandum was innocent. The failure to produce it was not a single violation of a single court order. The request for production was made in July 1991. In December, the court ordered production within ten days, and ruled that by not responding to the July request, EEC had waived whatever objections it had to it. The December order was violated by failure to produce the memorandum within ten days, and by continued refusal to produce documents based on objections that the court had already ruled had been waived.

[5] The Carroll memorandum destroyed EEC's claim that the difficulties arose from conditions it could not have anticipated because other parties hid the difficulties from it. There was plenty of evidence that EEC was doing its best to hide the memorandum, but the sanction did not require such a finding.

[6] EEC was wrong in claiming that they were entitled to a warning before dismissal. A district judge has discretion to make such orders as are just in regard to a party's failure to obey discovery orders, including dismissal. The central factor in evaluating the district court order is justice, end everyone has notice that dismissal is a possible sanction for failure to obey discovery orders. It is not always necessary to impose less serious sanctions first, or to give any explicit warning.

[7] In this case, the judge had already warned American Home, which had engaged in the same discovery violations, that further discovery abuse would result in severe monetary or other sanctions. The judge repeatedly imposed monetary sanctions on EEC and its bonding company; the sanctions had not worked to shake loose the Carroll memorandum.

[8] What is most critical for case-dispositive sanctions is whether the discovery violation threatens to interfere with the rightful decision of the case. Dismissal is appropriate when a pattern of deception and abuse make it impossible for the district court to conduct a trial with any reasonable assurance that the truth will be available.

[9] It took years to shake loose the Carroll memorandum. EEC's adversaries would probably never have seen it, had Credit Suisse's lawyer not spotted the obliterated note and a memorandum obliquely referring to it. EEC continued to refuse to produce the memorandum, and its witnesses continued to deny any recollection that such a memorandum existed, even after it was plain that Credit Suisse's lawyer had figured out that it must exist. It was a reasonable inference that if there was other discoverable material harmful to its case, EEC would have hidden it. When a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts, a case-dispositive sanction may be appropriate.

[10] That Calpine's attorney had possession of the Carroll memorandum for six weeks did not entitle EEC to continue to litigate with Calpine, because EEC's willful withholding of the memorandum had seriously impaired the public interest in expeditious resolution, and had cast a pall on the disobedient parties' integrity, and the expectation that the case was capable of a fair and just resolution on the merits.

[11] The wrong from hiding the Carroll memorandum and lying about it was not merely to Credit Suisse, but to all the

parties EEC sued, and to the justice system itself. [12] There was no more reason to expect that everything was finally disclosed so that Calpine and Enervest could obtain a fair trial than there was for Credit Suisse.

COUNSEL

Diane Wallis Huijgen, Huijgen & Associates, Union City, California, for appellant Electric Engineering Company.

Mark Pomeranz, Pomeranz & Landsman, North Miami, Florida, for appellant Electric Engineering Company.

Kenneth M. Fitzgerald, Latham & Watkins, San Diego, California, for appellees Credit Suisse and Bruce Brown.

Chris Gibson, Sacramento, California, for appellees Calpine and Will B. Betchart.

Steven N. Yermish, Paoli, Pennsylvannia, for appellees Enervest Corporation & Enervest Management Corporation.

OPINION

KLEINFELD, Circuit Judge:

This case concerns sanctions for discovery violations.

Jurisdiction and Standards of Review.

We have jurisdiction over this timely filed appeal pursuant to 28 U.S.C. § 1291. A dismissal under Fed. R. Civ. P. 37 is reviewed for abuse of discretion. *Anheuser-Busch, Inc. v. Natural Beverage Distributors,* 69 F.3d 337, 348 (9th Cir. 1995). The district court's factual findings are reviewed for clear error. *Id.*

Appendix A

Facts.

Nugget Hydroelectric hired Electric Engineering to build four small hydroelectric projects for $11 million. Because construction was going badly, the scope of the contract was reduced from four projects to one. The contract price on the remaining project, Deadwood Creek, was raised from $2 million to $2.5 million. The contract was a turn-key deal, requiring that Electric Engineering get all required permits and easements, and take full responsibility for design, not relying on Nugget Hydroelectric. Electric Engineering did not build the project as promised, and was fired when it missed its deadlines. Electric Engineering's president knew when Electric Engineering agreed to the revised Deadwood Creek contract that Electric Engineering was not going to perform as promised.

Just before the revised agreement was signed, Electric Engineering's project manager for the Deadwood Creek project, John Carroll, wrote to the company president, cross-copying the company's lawyers, the memorandum critical to this case. The importance of the memorandum is apparent from its face:

> *I have agonized over the available evidence for the entire weekend and have made several false starts of this letter.*
>
> . . .
>
> Deadwood appears to be priced with the same unit prices [as Big Mosquito, one of the three deleted projects]. I do not know the justification for using the same unit prices for Deadwood as Big Mosquito. *It is impossible to build the job for the bid prices. The installation of the penstock could cost two or three times the bid amount.*

Appendix A

. . .

The two inlets for Deadwood are located in incredibly difficult terrain, several thousand feet from the nearest dirt road access.

. . .

Nine thousand feet of Deadwood penstock must be delivered several thousand feet down a 1:1 slope and then delivered horizontally to its installation point.

. . .

I am scared to death of the cost of constructing Deadwood. We have little time to experiment to find the best methods. We have limited resources with which to do the job.

. . .

While this is going on, Bill McCarty can be cooperating to resolve all of the pay request matters to bring us up to date with our billing. The bank should be so happy to see this happening, *we should have another pay day before the plug is pulled on Deadwood.*

(emphasis added).

Ultimately Electric Engineering failed to complete the project and was fired, Nugget Hydroelectric went bankrupt, and a subcontractor completed the project. Multiple lawsuits were filed in every direction. Electric Engineering sued other entities and people involved on the theory that their interference and failures to disclose had caused the overruns.

The claims against American Home, Electric Engineering's surety, went to trial, but were settled mid-trial. The claims by

and against Electric Engineering never got to trial. After endless discovery disputes, the judge eventually dismissed Electric Engineering's claims as a discovery sanction. Electric Engineering had committed many discovery violations. The most critical had to do with hiding the memorandum quoted at length above. Electric Engineering appeals from dismissal of its claims against the construction lender (Credit Suisse), its project monitor (Calpine), the owner (Enervest, which owned Nugget), and various individual defendants.

Analysis.

The main issues on appeal boil down to these three: (1) did Electric Engineering waive its right to appeal the issues it does; (2) did the district court err in finding that Electric Engineering deliberately hid the memorandum; and (3) was hiding the memorandum a sufficient basis for so harsh a discovery sanction as dismissal?

A. Waiver.

Electric Engineering appealed the discovery sanction before judgment was entered as to all claims and all parties. We dismissed the appeal for lack of jurisdiction, because it was interlocutory. *Valley Engineers v. American Home Assurance Co.*, 111 F.3d 139 (table), 1997 WL 191468, at **2 (9th Cir., April 17, 1997). Credit Suisse argues that because Electric Engineering did not appeal the dismissal as to Credit Suisse in that earlier appeal, only as to other defendants, it waived its right subsequently to appeal the sanctions order as to Credit Suisse. But none of its citations are on point, because in those cases, the appellate court had jurisdiction over the first appeal.

The point of the cases Credit Suisse relies on is that if a party has a chance to appeal a mistake to a court that can correct the error, and does not, then it should not be able to appeal the error when a subsequent occasion for appeal arises.

Alioto v. Cowles Communications, Inc., 623 F.2d 616, 618 (9th Cir. 1980) ("a new contention that could have been but was not raised"). The reason for this rule does not apply where the claimed error could not have been corrected because the appellate court lacked jurisdiction. An appeal that is dismissed because the appellate court lacks jurisdiction does not bar or waive a subsequent appeal when jurisdiction exists.

B. Willfulness.

For more than three years, Credit Suisse, taking the lead for defendants in discovery, had unfulfilled requests for production outstanding that covered the Carroll memorandum. For more than two years, Electric Engineering's lawyers violated court orders by failing to produce it. Several trial date settings had to be vacated because the discovery was incomplete. Warnings were given and monetary sanctions were imposed as Electric Engineering violated one court order after another. Even after, as a sanction, Electric Engineering had lost its attorney-client privilege regarding discovery requests, it continued to assert the nonexistent privilege regarding the Carroll memorandum. Finally, on the eve of a sanctions hearing, new lawyers for Electric Engineering produced the memorandum. Credit Suisse moved for case-dispositive sanctions, and got them.

The magistrate judge held two days of hearings, with testimony in person and by videotape, in order to resolve the sanctions motion. He found, after meticulous analysis of all the evidence, that Electric Engineering's "disobedience of the court's order was willful," and "the Carroll memorandum was intentionally withheld from disclosure in willful violation of the court's order." The district judge independently conducted a careful review of the magistrate judge's findings and recommendations in light of the objections submitted. The district judge reached the same conclusion, for the reasons mentioned

by the magistrate judge and for some additional ones noted by the district judge.

Electric Engineering argues that this finding of fact was clearly erroneous. Its argument is that the Carroll memorandum had been produced to another party, Calpine, showing absence of willfulness, and that the memorandum was not so important that willfulness could be inferred from the fact of its nonproduction. Electric Engineering also argues that the nonproduction should be blamed on American Home, its performance bonding company that was managing the litigation during part of the litigation, not on Electric Engineering.

[1] We have carefully reviewed the record and find ample support in it for the conclusions reached by the magistrate judge and district judge. The Carroll memorandum was what any experienced lawyer would call a "smoking gun." It showed that the man who knew the most about the construction project, the project manager, knew it could not be done as promised, had told the president of the company, and consciously viewed the company's conduct as a way to "have another pay day before the plug is pulled." The memorandum established that overwhelming obstacles to successful completion were known to Electric Engineering and were not the result of interference by the other participants in the project. It was a fair inference that Carroll would not have "agonized over the available evidence for the entire weekend and have made several false starts of this letter" if the substance of the letter was not viewed by him as especially agonizing and important. Willfulness was a fair inference from the fact that, in the euphemistic phrasing of the magistrate judge, the critical witnesses' testimony was "not credible."

The writer of the memorandum, John Carroll, testified in his first deposition that he did not recall writing any memorandum about the subject at the time. At that time, his interrogators did not have a copy of the memorandum. But they knew what to ask about, because a sharp-eyed associate, Ken-

neth M. Fitzgerald, had discovered a handwritten notation by one of the attorneys to another, heavily crossed out, and had obtained expert assistance in reading what was crossed out; it said "Carroll wrote a confidential memo 5/8/89 to Francis [Royer, the president of Electric Engineering] to say job can't be completed on time."

David Bunim, American Home's lawyer, had written this in a conference with Douglas Noll, Electric Engineering's lawyer. Bunim testified that he had crossed the notation out because when he asked Noll about it, he realized he had misunderstood, and was told that there was no such memorandum, and then continued to doodle away at it as they talked. Noll testified that he did not remember anything about this, and did not recall the Carroll memorandum. But someone in Mr. Noll's office had caused six copies of the Carroll memorandum to be put in various files immediately upon his receipt of it, and Noll had discussed it at length with Bunim. The magistrate judge found that Bunim's testimony was "simply not believable" because his other strike-outs did not obliterate notations so that they were unreadable, and because the obliteration was made with different colored ink. Also, American Home had similarly obliterated another damaging notation in another document when it was finally produced. The magistrate judge found that American Home had obliterated the notation after the court had found that American Home had waived its privilege claim and had acted in concert with Electric Engineering to hide evidence. The district judge likewise, after independent review of the evidence, found that "Mr. Bunim's testimony is not credible."

Eventually, after Electric Engineering had used Noll's firm, then Michael Gebers', then Rosenbaum's, then Pomeranz & Landsman assisted by Patrick Fabian, Mr. Fabian asked Rosenbaum's associate Jack Schwartz about the Carroll memorandum and Mr. Schwartz produced it to Mr. Fabian without hesitation. Mr. Fabian produced it to Credit Suisse on the eve of the scheduled hearing on Credit Suisse's motion for sanc-

tions. None of the findings regarding dishonesty relate to Electric Engineering's current attorneys, including Mr. Fabian, and Pomeranz & Landman. In Carroll's second deposition, after his interrogators had obtained the memorandum and put a copy in front of him, Carroll admitted that he had written the memorandum and sent it to Royer. Royer testified that he had not seen Carroll's memorandum addressed to him, but the lines at the tops of the faxes showed that it had been faxed to his company's lawyers from his machine. Neil Rosenbaum, as Electric Engineering's lawyer, had written a letter to Royer obliquely referring to the Carroll memorandum.

[2] Immediately before being replaced by Neil Rosenbaum as Electric Engineering's lawyer, Michael Gebers delivered five boxes of materials in response to a request for production by Calpine. The Carroll memorandum was in one of the boxes. Electric Engineering argues that this shows its failure to produce the materials to Credit Suisse was an accident. But Calpine's lawyer had put off reading the documents in the five boxes to minimize litigation expense to his client, because he thought he would win (as he did) on a dispositive motion he had filed on the ground that Electric Engineering lacked a required contractor's license. He told Rosenbaum that he had not yet read the papers in the boxes. Rosenbaum came over to his office with an associate and took the boxes back. Despite Calpine's lawyer's having had possession of the Carroll memorandum for six weeks, Rosenbaum knew that Calpine's lawyer had not seen the Carroll memorandum. In the context of all these facts, production to Calpine does not show, as Electric Engineering urges, that the district court clearly erred in finding willfulness of its nonproduction to Credit Suisse.

[3] The district judge pointed out that inclusion of the Carroll memorandum in the boxes delivered to, but not read by, Calpine's lawyer, but omission of it in subsequent Electric Engineering production, supports the inference that Electric

Engineering deliberately withheld production from Credit Suisse. The magistrate judge had called the Calpine production a "momentary lapse in EEC's otherwise persistent policy to suppress the Carroll memorandum." This "momentary lapse" implies more than mistaken honesty. Once the memorandum was in Electric Engineering's discovery materials retrieved by Rosenbaum, someone had to take the affirmative step of pulling it out.

What we describe above is evidence of a shocking betrayal of obligations to the court and opposing counsel, that led the magistrate judge and then the district judge to make a finding of fact that the Carroll memorandum was willfully hidden in a purposeful evasion of discovery obligations. The claim, "I don't remember," can be a lie if the speaker does remember, and even though no one can see another's memory, the falsity is subject to proof by circumstantial evidence, admissions, and other evidence. The district court finding that "the Carroll memorandum was intentionally withheld from disclosure in willful violation of the court's order" was not clearly erroneous.

C. Appropriateness of sanction.

Electric Engineering argues that the district judge abused his discretion by imposing so harsh a sanction as dismissal. It says (1) it partially complied by producing thousands of pages of other documents; (2) one willful violation is not enough to justify dismissal; (3) the Carroll memorandum was not so important that nonproduction was seriously prejudicial; (4) there was no evidence that Electric Engineering had anything to do with its attorney's failure to produce the Carroll memorandum; (5) the district court did not adequately consider milder sanctions; and (6) Electric Engineering was not warned that so serious a sanction would be imposed if it did not produce the document.

[4] Producing thousands of pages, but not the most important four pages, could be innocent in some circumstances, but

there was no reason to think that omission of the Carroll memorandum was an innocent omission in this case. The failure to produce the Carroll memorandum was not a single violation of a single court order, so we need not decide whether, had it been, the violation would have justified dismissal. The request for production that should have elicited the Carroll memorandum was made in July of 1991. Electric Engineering did not comply. In December of 1991, the court ordered production within 10 days. The court ruled that by not responding to the July request for production, Electric Engineering had waived whatever objections it might have to it, and imposed a monetary sanction of attorneys' fees and expenses. That December 1991 order was violated by failure to produce the Carroll memorandum within 10 days, and by continued refusal to produce documents based on objections that the court had already ruled had been waived.

Electric Engineering cites *Halaco Engineering Co. v. Costle,* 843 F.2d 376 (9th Cir. 1988), and *Fjelstad v. American Honda Motor Co.,* 762 F.2d 1334 (9th Cir. 1985), for the proposition that one willful violation of a court order is not enough to justify a case-dispositive discovery sanction. While *Halaco* in dicta so summarizes *Fjelstad* in a parenthetical, *Halaco,* 843 F.2d at 381, the parenthetical left out what is for this case the critical qualifying language in *Fjelstad*: "In these circumstances." *Halaco* and *Fjelstad* were carefully case-specific. *Halaco* reversed a case-dispositive sanction against the EPA for redacting a report and commissioning a report that accused someone of environmental violations without factual basis, but even though the district court had found that the redactions were not "a deliberate attempt to withhold evidence or deceive," and the unfair report would not be so prejudicial as to justify dismissal because "Halaco would have ample means to discredit the report." In *Fjelstad,* response to discovery had been exceedingly slow despite court orders to do it much sooner, but no willful deception was found, the untimeliness did not prejudice the other side, and there was nothing about the pattern of production to suggest an infer-

ence that the recalcitrant party's defenses were meritless. *Fjelstad* invited consideration of the facts of the particular case by its qualifications, "In these circumstances," and "in the circumstances presented by this record." The facts of the case at bar show dishonesty, not just recalcitrance and delay, regarding production of critical evidence.

[5] The Carroll memorandum was exceedingly important, as we have explained. It destroyed Electric Engineering's claim that the difficulties arose from conditions it could not have anticipated when it signed the second version of the contract, because other parties hid the difficulties from it. There was plenty of evidence that Electric Engineering, not just its lawyers, was doing its best to hide the memorandum, such as the testimony of its president and of Carroll, but the sanction did not require such a finding. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962).

[6] Electric Engineering is wrong on the facts and the law, in claiming that they were entitled to a warning they did not receive before dismissal could be an appropriate sanction. Federal Rule of Civil Procedure 37(b)(2) gives a district judge discretion to "make such orders . . . as are just" in regard to a party's failure to obey a discovery order, including dismissal. Thus the central factor in evaluating the district court order is justice, and everyone has notice from the text of Rule 37(b)(2) that dismissal is a possible sanction for failure to obey discovery orders. We have come up with a five-part "test" to determine whether a dismissal sanction is just:

> (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the [party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). We have said that where a court order is vio-

lated, factors 1 and 2 support sanctions and 4 cuts against case-dispositive sanctions, so 3 and 5, prejudice and availability of less drastic sanctions, are decisive. *Adriana International Corp. v. Thoeren,* 913 F.2d 1406, 1412 (9th Cir. 1990). We have said that factor 5 involves consideration of three subparts: whether the court explicitly discussed alternative sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of dismissal. *Malone,* 833 F.2d at 132. But despite all this elaboration of factors, we have said that it is not always necessary for the court to impose less serious sanctions first, or to give any explicit warning. *Adriana,* 913 F.2d at 1413.

Like most elaborate multifactor tests, our test has not been what it appears to be, a mechanical means of determining what discovery sanction is just. The list of factors amounts to a way for a district judge to think about what to do, not a series of conditions precedent before the judge can do anything, and not a script for making what the district judge does appeal-proof. The magistrate judge and district judge did expressly consider the factors we have listed. The list of factors also provides a non-exhaustive list of things we can think about in evaluating what the district judge did, subject to our deferential review for abuse of discretion. "Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction." *Adriana,* 913 F.2d at 1408.

[7] The significance of warning is that a sanction may be unfair if the party could not have realized that it was in jeopardy of so severe a consequence if it was in error regarding its discovery posture. Rule 37 tells all lawyers and their clients that dismissal is possible if they violate discovery orders, and direct warnings or other circumstances may make it clear that it is a real risk of continued violation in the particular case. In this case, there could have been no doubt. The judge had already warned American Home, who engaged in the same discovery violations on the same side, mainly hiding the

Carroll memorandum, that "any further discovery abuse by American will result in severe monetary or other sanctions, which may include any of those orders provided for by Fed. R. Civ. P. 37(b)(2)." Months before Electric Engineering disclosed the Carroll memorandum, the district judge reacted to Electric Engineering's repeated failure to produce its president, Royer, for deposition, by saying "I am highly disturbed by the shenanigans that Electrical Engineering is pulling and has been pulling for some time." The judge expressly warned that if Electric Engineering were to again "try to do something to frustrate the speedy disposition of the case," he would "consider striking Electrical Engineering's answer on the complaint and dismissing its counterclaim and other cross-actions." At that point, Electric Engineering knew it was in serious jeopardy of dismissal for violation of discovery orders. The district judge had repeatedly imposed monetary sanctions on Electric Engineering and its bonding company; the sanctions had not worked to shake the Carroll memorandum loose.

[8] What is most critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether the discovery violations "threaten to interfere with the rightful decision of the case." *Adriana*, 913 F.2d at 1412. While contumaciousness toward the court needs a remedy, something other than case-dispositive sanctions will often suffice. Dismissal is appropriate where a "pattern of deception and discovery abuse made it impossible" for the district court to conduct a trial "with any reasonable assurance that the truth would be available." *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995).

There is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result. Sometimes, as in *Anheuser-Busch*, a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts. The district court found that to be so in this case. The magistrate judge

found that "EEC's conduct in the litigation has cast such a pall upon EEC's integrity and upon a fair and just resolution on the merits that no alternative sanction could be effective." The district judge expressly found this to be "a perfect expression" of the risk of prejudice and the inappropriateness of lesser sanctions.

[9] It took years to shake loose the Carroll memorandum. Electric Engineering's adversaries probably would never have seen it, had Credit Suisse's lawyer not been sharp enough to spot what was not there, when he saw the obliterated handwritten note and another memorandum obliquely referring to it. Electric Engineering continued to refuse to produce the memorandum, and its witnesses continued to deny any recollection that such a memorandum existed, even after it was plain that Credit Suisse's lawyer had figured out that it must exist. Considering how Electric Engineering acted regarding the Carroll memorandum, it was a reasonable inference that if there was other discoverable material harmful to its case that its adversaries did not know about, it would be hidden forever. Where a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate. It was on this record.

D. Enervest and Calpine.

Credit Suisse was the only movant on its successful motion for dismissal as a discovery sanction. After the magistrate judge issued his first set of findings and recommendations favorable to Credit Suisse's motion, Calpine (Credit Suisse's monitoring engineer) and Enervest (owner of the Nugget Hydroelectric) made similar motions. They won, and Electric Engineering argues that even if the dismissal of its claims against Credit Suisse stands, it should be allowed to pursue its claims against Calpine and Enervest. Electric Engineering argues that Enervest had not even made a discovery request requiring production of the Carroll memorandum, Electric

Engineering had produced the memorandum to Calpine (the unread five boxes discussed above), and there had been no court order requiring production to Calpine and Enervest that was violated.

[10] The magistrate judge considered all these points, and found against Electric Engineering. The magistrate judge found that because Electric Engineering's claims against the other defendants were "essentially the same" as its claims against Credit Suisse, "it would not be just to allow EEC to continue to assert them against any party." That Calpine's attorney had possession of the Carroll memorandum but did not know it for six weeks until Rosenbaum took it back, did not entitle Electric Engineering to continue to litigate with Calpine, because Electric Engineering's willful withholding of the Carroll memorandum "had seriously impaired the public interest in expeditious resolution" and had "cast a pall upon the disobedient parties' integrity and the expectation that this case is capable of a fair and just resolution on the merits."

Electric Engineering would ordinarily have had 10 days from service to object to the magistrate judge's findings and recommendations. Federal Rule of Civil Procedure 72(b). But in response to Electric Engineering's request for more time, the magistrate judge provided in his written order that any party could file objections "within 20 days after service." Service was April 22, but the objections were not filed until May 20, which was late. Electric Engineering argues that intermediate weekend days should be excluded because the 20 days should be viewed as two 10-day periods, and weekends are excluded from 10-day periods under Federal Rule of Civil Procedure 6(a). The argument is frivolous. Rule 6(a) says intermediate weekends are excluded "[w]hen the period of time prescribed or allowed is less than 11 days." Twenty is more than 11. Allowing the three days for service by mail pursuant to Rule 6(e), and the extra day if the last day is Sunday under Rule 6(a), opposition was due Monday May 16.

The district judge deemed Electric Engineering to have waived objection to the magistrate judge's findings and recommendations and dismissed Electric Engineering's claims against the remaining defendants. As to American Home, the judge considered the identical objections on the merits, and reached the same conclusion, because of the "nexus" between American Home's wrongful conduct and its claims.

Our law on waiver is somewhat difficult to apply. We have held that forfeiture or waiver is not complete on dispositive motions, but goes only to factual findings, leaving parties free to appeal the magistrate judge's conclusions of law. *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991). But in *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174, n. 2 (9th Cir. 1996), we noted that our cases have been inconsistent on whether failure to object on dispositive motions effects a complete forfeiture of the right to appeal. We need not resolve the question here, because we would affirm if Electric Engineering's objections were waived, and also if we review on the merits.

[11] The district court's authority where a party fails to obey an order, as the magistrate judge pointed out, is to "make such orders in regard to the failure as are just." Federal Rule of Civil Procedure 37(b)(2). The rule does not limit the court to rewarding the party wronged. *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997). In *Payne*, we upheld dismissal in favor of a party that had not been a party to the violated discovery requests. The wrong from hiding the Carroll memorandum and lying about it was not merely to Credit Suisse, but to all the parties Electric Engineering sued, and to the system of justice itself. The Carroll memorandum was important to all the parties, because the claims were materially similar, and all the other parties were working together on discovery with Credit Suisse taking the lead. Although Calpine's lawyer had possession of the memorandum for six weeks, until Rosenbaum took it back, he did not know he had it and he never saw it, because of his reasonable decision to defer read-

ing it pending disposition of his well-founded 12(b)(6) motion.

[12] As the magistrate judge said, Electric Engineering's violations of court orders regarding discovery "had seriously impaired the public interest in expeditious resolution," referring to the several continuances of the trial that had been necessitated, and the three years wasted in nothing but a struggle to obtain discovery of what should have been promptly produced. Likewise, as the magistrate judge said, hiding the Carroll memorandum and lying about it had "cast a pall upon the disobedient parties' integrity and the expectation that this case is capable of a fair and just resolution on the merits." There was no more reason to expect that everything was finally disclosed so that Calpine and Enervest could obtain a fair trial than there was for Credit Suisse.

Conclusion.

The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED DECEMBER 14, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16383
D.C. No. CV-91-00008-EJG

VALLEY ENGINEERS INC.; NUGGET HYDROELECTRIC, L.P.,

Plaintiffs,

v.

ELECTRIC ENGINEERING COMPANY;

Defendant-Counter-
Claimant-Cross-Claimant-
Appellant,

CREDIT SUISSE, a Swiss Corporation;

Counter-Defendant-
Counter-Claimant-
Appellee,

BRUCE BROWN; CALPINE CORPORATION; WILLIAM B. BETCHART,

Counter-Defendants-
Appellees,

and

Appendix B

AMERICAN HOME INSURANCE COMPANY,

Counter-Defendant,

v.

ENERVEST CORPORATION, a Colorado Corporation; ENERVEST MANAGEMENT CORPORATION, a Colorado Corporation,

Third-Party-Defendants-Appellees.

ORDER

Before: WALLACE, T.G. NELSON, and KLEINFELD, Circuit Judges.

1. Counsel for Credit Suisse, Bruce Brown, Valley Engineers, Inc. and Nuggett Hydroelectric, L.P., have given the court notice of a settlement agreement between those parties and Electric Engineering Company regarding costs and attorneys' fees pursuant to the court's October 21 order to show cause. Based on that letter, no costs or attorneys fees are awarded under Federal Rule of Appellate Procedure 38 in favor of those parties.

2. Electric Engineering Company's motion to dismiss appellees Credit Suisse and Bruce Brown with prejudice is denied without prejudice. It appears to be moot because of the order in paragraph 1 above, and to the extent it may address matters that are not moot, we are unable to evaluate it because the settlement agreement has not been filed. *See* Fed. R. App. P. 42(b).

3. With respect to Calpine Corporation and Will B. Betchart, we have studied the briefs filed pursuant to the order to show cause. Sanctions are justified, under the rule and *Adriana International Corp. v. Thoeren*, 913 F.2d 1406, 1417 (9th Cir. 1990). Attorneys' fees and double costs are awarded in favor of these two parties. The case is referred to the Ninth Circuit Court of Appeals Appellate Commissioner, Peter Shaw, for recommendation as to the amount of fees. The award relates only to this appeal, not to the previous interlocutory appeal. The award is against Electric Engineering only, not against counsel.

4. Electric Engineering Company's motion for leave to file motion to strike non-responsive material from appellee's OSC briefs and/or for supplemental briefing schedule is DENIED AS MOOT.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED OCTOBER 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-16383
D.C. No. CV-91-00008-EJG

VALLEY ENGINEERS INC.; NUGGET HYDROELECTRIC, L.P.,

Plaintiffs,

v.

ELECTRIC ENGINEERING COMPANY;

Defendant-Counter-Claimant-Cross-Claimant-Appellant,

CREDIT SUISSE, a Swiss Corporation;

Counter-Defendant-Counter-Claimant-Appellee,

BRUCE BROWN; CALPINE CORPORATION; WILLIAM B. BETCHART,

Counter-Defendant-Appellees,

and

Appendix C

AMERICAN HOME INSURANCE COMPANY,

Counter-Defendant,

v.

ENERVEST CORPORATION, a Colorado Corporation; ENERVEST MANAGEMENT CORPORATION, a Colorado Corporation,

Third-Party-Defendants-Appellees.

ORDER

Before: WALLACE, T.G. NELSON, and KLEINFELD, Circuit Judges.

1. Electric Engineering's motion to sever its appeal in district court action 90-0159 and transfer it to the Bankruptcy Appellate Panel, is DENIED. The district court at all material times had discretion to withdraw the reference. By proceeding with decision in 90-0159, with the full participation of Electric Engineering and without objection from Electric Engineering to its exercise of jurisdiction, the district court sua sponte withdrew reference of No. 90-0159 from the bankruptcy judge. *See* 28 U.S.C. § 157(d).

2. Appellees Credit Suisse and Bruce Brown's request for judicial notice is GRANTED.

3. Appellant Electric Engineering Company's request for judicial notice is DENIED.

4. Appellant Electric Engineering Company's supplemental request for judicial notice is DENIED.

5. Appellees Credit Suisse and Bruce Brown's motion to strike exhibits A and B of Electric Engineering Company's request for judicial notice and portions of reply brief based thereon is GRANTED.

6. Appellees Credit Suisse and Bruce Brown's motion to strike appellant Electric Engineering Company's supplemental request for judicial notice is DENIED AS MOOT.

7. ***SHOW CAUSE ORDER.*** The court has determined that appellant Electric Engineering Company's appeal is frivolous. Accordingly, pursuant to Federal Rule of Appellate Procedure 38, the parties shall file within 21 days of the date of this order simultaneous briefs not to exceed 15 pages each on the question of whether the court should award "just damages" of attorneys' fees and single or double costs to appellees.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED JUNE 11, 1997 AND FILED JUNE 12, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV. NO. S-91-008 EJG/PAN

VALLEY ENGINEERS, INC.,

Plaintiff,

v.

ELECTRIC ENGINEERING COMPANY, et al.,

Defendants.

AND RELATED ACTIONS.

ORDER

1. In accordance with the court's orders of June 24, 1994 and May 6, 1997, the Clerk is directed to enter judgment for Credit Suisse, Bruce Brown, Calpine Corporation, William Betchart, Enervest Corporation, and Enervest Management Corporation on the claims of Electric Engineering Company ("EEC") and to enter judgment for Enervest Corporation, Enervest Management Corporation, Credit Suisse, and Nugget Hydroelectric on the claims of American Home Assurance Company ("AHA").

2. For the reasons given in its order of May 6, 1997 and in the parties' briefs submitted pursuant to that order, the court declines to exercise jurisdiction over EEC's remaining claim for declaratory relief against AHA. *See* 28 U.S.C. § 2201; *Brillhart v. Excess Ins. Co.* 62 S. Ct. 1173 (1942); *see also Polido v. State Farm Mutual Automobile Ins. Co.*, 1997 WL 160638 (9th Cir. 1997); *Government Employees Ins. Co. v. Dizol*, 108 F.3d 999 (9th Cir. 1997). EEC's claim is dismissed without prejudice to the parties' pending state court action.

3. The hearing set for June 20, 1997 is vacated.

IT IS SO ORDERED.

Dated: June 11, 1997

s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED, ENTERED AND FILED JUNE 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NUMBER: CIV S-91-8 EJG PAN

VALLEY ENGINEERS INC

v.

ELECTRIC ENGINEERING CO ET AL

JUDGMENT IN A CIVIL CASE

XX — **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 6/24/94, 5/6/97 and 6/12/97.

Jack L. Wagner,
Clerk of the Court

ENTERED: June 12, 1997

by: s/ illegible
NDD, Deputy Clerk

APPENDIX F — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED APRIL 22, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S-91-0008-EJG PAN

VALLEY ENGINEERS, INC., a California corporation,

Plaintiff,

v.

ELECTRIC ENGINEERING COMPANY,
a Florida corporation, et al.,

Defendants.

AND RELATED CROSS-CLAIMS

FINDINGS AND RECOMMENDATIONS

On March 16, 1994, I recommended that EEC's and American Home's claims against Credit Suisse be stricken and that judgment be entered in favor of Credit Suisse as a sanction for EEC's and American Home's willful violation of a court order compelling them to provide discovery requested by Credit Suisse. While EEC's and American Home's objections were pending before the district judge Calpine, Betchart, Enervest Corp. and Enervest Management Corp. ("movants") requested that Judge Garcia modify my findings and recommendations to include so-called terminating sanctions against EEC and

American vis-a-vis movants. Judge Garcia referred this matter to me for additional findings and recommendations and a hearing was scheduled on April 22, 1994.

Chris Gibson, Esq. of Sacramento appeared for Calpine and Betchart; Cindy Lee Hill, Esq. of Sacramento appeared for Enervest Corporation and Enervest Management Corporation; Dean H. Kayes Esq. of San Francisco appeared for American Home; Mark L. Pomeranz of Florida and Diane Huijgen-Stepanovich of California appeared for EEC; and Kenneth Fitzgerald of San Diego appeared for Credit Suisse and Bruce Brown.

At the hearing, Credit Suisse and Bruce Brown requested that the findings and recommendations filed March 16, 1994, be amended to reflect that the sanctions were awarded in favor of Bruce Brown as well as Credit Suisse. That request is granted.

EEC first claims that the relief requested by movants would deprive EEC of notice of movants' claims, an opportunity to be heard and present a defense and due process of law. EEC had notice of movants' claims when they filed their request, the opportunity to argue their opposition, and the opportunity to argue their claims at the hearing on April 22. No other process is due.

EEC next claims that the movants have no standing to request the relief sought because they did not make the discovery request that resulted in the order that I found EEC and America disobeyed, In support, EEC relies upon Fed.R.Civ.P.37(a)(2), which provides that if a party fails to respond to a request for documents the "discovering party" may move for an order compelling discovery. The relief

recommended in favor of Credit Suisse and Bruce Brown, however, is available pursuant to Fed.R.Civ.P. 37(b)(2) for failure of a party to obey an order to provide or permit discovery. The rule conspicuously does *not* limit relief to the "discovering party" but rather provides for "such orders in regard to the failure as are just." The question is whether under the circumstances of the case the imposition of terminating sanctions in favor of movants would be just, not whether they obtained the order that EEC and American disobeyed.

For the reasons set forth in Calpine's brief filed March 25, 1994, the court finds that the relief sought by movants against EEC is not only just but is required.

Enervest and Enervest Management contracted with EEC to construct the Deadwood hydroelectric project. American Home bonded EEC's performance. Credit Suisse financed the construction and engaged Calpine to review and report to Credit Suisse upon the progress. Betchart was the engineer employed by Calpine to perform this obligation. About a year after Nugget terminated EEC (on December 8, 1989) for alleged delay and defaults, Valley, a subcontractor, sued EEC for unpaid labor and materials furnished to the project. EEC then sued Credit Suisse, Calpine, Betchart and Enervest and Enervest Management alleging that they conspired to conceal from EEC facts material to its contract obligation. The Carroll memorandum, which EEC wilfully suppressed, belies these claims. Because the claims made by EEC against Calpine and Enervest are essentially the same as the claims made against Credit Suisse, it would not be just to allow EEC to continue to assert them against any party.

Appendix F

EEC also contends that Calpine was not prejudiced by the misconduct ascribed to EEC because Calpine actually had the Carroll memorandum. The court previously found that EEC's former counsel, Douglas Noll, obtained the Carroll memorandum from EEC's president, Francis Royer. The documents Noll had were passed on to Michael Gebers and by him to Neil Rosenbaum. The court has also found that Mr. Rosenbaum possessed the Carroll memorandum and the inference is inescapable that Gebers must have had it.

Calpine's attorney, Chris Gibson, states in a declaration filed April 11, 1994, that responsive to Calpine's document request served July 30, 1991, Mr. Gebers delivered five boxes of EEC's documents to Mr. Gibson's offices on February 4, 1992. In order to avoid expense to his client, Mr. Gibson never reviewed documents. Mr. Rosenbaum retrieved them from Mr. Gibson's offices on March 27, 1992. EEC contends that Mr. Gibson possessed the documents for "several months" and for purposes of deciding the pending requests the court accepts EEC's actual claim.

The court previously found that EEC's document production to Calpine included the Carroll memorandum. F&R filed Mar. 10, 1994, p. 6, lines 14-16. The court also now find that Calpine's attorney did not recognize that he had the Carroll document, which was among five boxes of documents delivered to him by EEC's attorney, Michael Gebers. Mr. Gibson avoided reviewing the documents to avoid expense because he expected that EEC's claims against Calpine would be dismissed before trial on a motion pursuant to Fed. R. Civ. P. 12 (b).

The remaining question is whether by reason of an early and momentary lapse in EEC's otherwise persistent policy to

suppress the Carroll memorandum — as a result of which Calpine's attorney *might* have but did not discover the contents of the Carroll memorandum when it was left in his office among five boxes of documents for several months in early 1992 — EEC should be allowed to continue to litigate with Calpine factual claims belied by the Carroll memorandum. The question answers itself; it would not be just. This is particularly so in light of the court's previous findings — that EECs and American's conduct was willful and that the Carroll memorandum was intentionally withheld in violation of the court's order; that the misconduct has seriously impaired the public interest in expeditious resolution of the litigation; and that the misconduct has cast a pall upon the disobedient parties' integrity and the expectation that this case is capable of a fair and just resolution on the merits.

Enervest and Enervest Management also seek terminating sanctions against American Home.

Credit Suisse, alleging that EEC defaulted upon its contract, sued American Home upon its performance bond and American Home sued Enervest, Enervest Management, Nugget and Credit Suisse seeking a declaration that American's bond obligation was exonerated. In support of its claim to declaratory relief, American avers that Enervest and EEC modified the construction contract without notice to American in ways that so materially increased American's risk of loss as to exonerate American's obligation; that progress payments made to EEC far exceeded the work performed and that the owner failed to timely discharge EEC and mitigate American's loss; and, alternatively, that EEC did not default its contract obligations. American makes essentially the same allegations as affirmative defenses to Credit Suisse's action against American on its bond.

Appendix F

American raises the same due process and lack of standing arguments asserted by EEC; they should be denied upon the same grounds.

American also contends that judgment should not be entered against it upon the claims between American and Enervest because (1) it is undisputed that American never had the Carroll memorandum and (2) American's proofs do not depend upon American's integrity but, rather, upon *Enervest's* evidence that it discharged its affirmative duty to keep American informed of changes and mitigate American's risk of loss. The first contention is correct. The second proposition is not accurate, however, because American Home bears the burden of producing evidence upon both its affirmative defenses and its claim to declaratory relief. In other words, unless American Home establishes the claimed legal duty to mitigate its risk of loss *and* produces credible evidence that Enervest and others failed to discharge such duty, American's claims must fail. The question, therefore, is whether in light of the court's prior findings, it is just to extend terminating sanctions against American to its claims vis-a-vis the Enervest entities.

I previously found that, acting in active concert or tacit agreement with EEC, American Home destroyed existence of the Carroll memorandum, which was harmful to their shared litigation interests, i.e., whether or not EEC defaulted. American Home also falsely denied the existence of the Carroll memorandum and, once it surfaced, offered an unbelievable explanation of its role in suppressing it. While American now contends that its bond was exonerated because Enervest failed to discharge a legal duty to better inform American about work changes that might affect American's risk, American attempted to suppress evidence that it had *waived* notice of changes.

Appendix F

American's resistance to another court order provoked prior characterization of its conduct as reprehensible. American also previously asserted attorney-client privilege to resist disclosure of a document that American knew or should have known had not been kept confidential and, in fact, had been made public in a judicial proceeding in France.

In light of American's past misconduct in this proceeding, although the Carroll memorandum per se may not be very important to American's disputes with the owner, it would not be just to require the Enervest entities to continue to litigate American's contentions. Put another way, Enervest and Enervest Management have been prejudiced because American's conduct in the proceeding has substantially undermined the reliability of the fact-finding process upon which a just result indispensably depends.

For all of the foregoing reasons, it is RECOMMENDED that the Findings and Recommendations filed March 16, 1994, be amended to reflect that the sanctions to be imposed in favor of Credit Suisse be extended to include Bruce Brown, Calpine, Betchart, Enervest Corporation and Enervest Management Corporation.

These findings and recommendations are submitted to the Honorable Edward A. Garcia pursuant to 28 U.S. C. § 636(b)(1)(C) Any party may file written objections to these findings and recommendations pursuant to Fed. R. Civ. P. 72(h) and L.R. 304(b) within 20 days after service.

Date: April 22, 1994.

s/ [illegible]
U.S. Magistrate Judge

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED MARCH 3, 1995 AND FILED MARCH 7, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV. NO. S-91-008 EJG/PAN

VALLEY ENGINEERS, INC.,

Plaintiff,

v.

ELECTRIC ENGINEERING COMPANY, et al.,

Defendants.

ORDER

This matter came before the court on objections to the Magistrate's recommendation that the court deny Electric Engineering Company's ("EEC") motion for reconsideration of the court's imposition of terminating sanctions, (*see* Order Adopting the Magistrate's Findings and Recommendations filed June 24, 1994), and on objections to Magistrate's denial of EEC's motion for discovery sanctions against Credit Suisse, Bruce Brown, and their attorneys. After reviewing EEC's objections to the Magistrate's recommendation and the record in this matter,[1] the court determines that oral argument would

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1. Credit Suisse and Nugget late-filed a response to EEC's objections. That response is ordered stricken from the record. *See* Local Rule 304(d).

not be of material assistance and, for the reasons given below, adopts the Magistrate's recommendation and affirms the Magistrate's denial of EEC's motion for sanctions.

I. Background[2]

These consolidated actions concern a construction dispute. In 1988, EEC contracted with Enervest Corporation to design four hydroelectric power plants in California. Enervest then assigned its rights and obligations under the contract to Nugget Hydroelectric, L.P. ("Nugget"). Credit Suisse financed the project. American Home Assurance Company ("AHA") bonded EEC's performance and also bonded the payment of subcontractors.

On May 11, 1989, following a number of delays and problems in construction, Nugget, Credit Suisse, and EEC entered a "Workout Agreement." Nugget and Credit Suisse agreed to reduce EEC's performance from four hydroelectric plants to one — the Deadwood plant. In addition, Nugget and Credit Suisse agreed to reduce EEC's performance from four hydroelectric plants to one — the Deadwood plant. In addition, Nugget and Credit Suisse agreed to increase the contract price of the remaining plant from $1,983,800.00 to $2,543,800.00. The Workout Agreement called for substantial completion of the Deadwood plant by October 5, 1989 and for final completion of the Deadwood plant by October 5, 1989 and for final completion of the plant by October 17, 1989. As part of the Workout Agreement, Nugget waived any claim it might have against EEC for breach of the original construction contract. On May 23, 1989, AHA agreed to increase the value of the

2. For a more detailed background, see the court's Order Adopting the Magistrate's Findings and Recommendations filed June 24, 1994.

performance and payment bonds from $1,983,800.00 each to $2,543,800.00 each.

Following the workout agreement, construction was again beset with problems. EEC sought over $1,000,000 in extra compensation for construction problems it characterized as unanticipated. On December 8, 1989, Nugget determined that EEC had not substantially completed the plant. Nugget terminated EEC and the present litigation ensued.

Nugget, in turn, brought claims against EEC for breach of contract, fraudulent misrepresentation, and negligence.[3] Credit Suisse and Nugget each brought claims against AHA for payment on the performance bond.

In essence, EEC took the position in its pleadings that Credit Suisse and Nugget's alleged wrongful conduct caused its default.[4] EEC alleged that Credit Suisse and Nugget wrongfully refused to approve its change orders, i.e., its requests for extra compensation, and that Credit Suisse and Nugget concealed information bearing on the difficulty of construction at the time of the Workout Agreement.

AHA contended that it was not liable on the performance bond because the construction contract was altered without

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3. Credit Suisse purchased Nugget's claims in bankruptcy proceedings.

4. EEC brought claims against Nugget and Credit Suisse for intentional interference with contractual relations; interference with prospective business advantage; conspiracy to conceal facts material to its performance; negligent supervision; and declaratory relief. Its defenses were similarly premised.

notice; because Credit Suisse negligently overpaid EEC; because AHA was not notified of EEC's termination; because EEC was wrongfully discharged; and because Credit Suisse and Nugget fraudulently concealed facts bearing on the risk of the project not being successfully completed.

On March 16, 1994 the Magistrate, after an evidentiary hearing, found that EEC had deliberately withheld unfavorable evidence responsive to a 1991 court order compelling its production. The Magistrate also found that AHA had assisted EEC in suppressing Credit Suisse and Nugget's discovery of the evidence. Among the suppressed evidence was a memo written by John Carroll (EEC's project manager) several days before EEC entered the workout agreement. The memo was addressed to Frances Royer, EEC's president, and Tom Cooper, EEC's counsel.

In the memo, Carroll indicated that EEC would not be able to complete the project for the bid price:

> Deadwood appears to be priced with the same unit prices [used for Big Mosquito, one of the other three hydroelectric plants]. I do not know the justification for using the same prices for Deadwood as Big Mosquito. It is impossible to build the job for the big prices. The installation of the penstock could cost two or three times the bid amount.[5]
>
> . . . .

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5. When confronted with the memo at deposition, Carroll confessed that, at the time EEC entered the workout agreement, he and Royer knew that completing the project would cost over one million dollars more than the bid price.

Appendix G

> I am scared to death at the cost of constructing Deadwood. We have little time to experiment to find the best methods. We have limited resources with which to do the job.
>
> It appears to me that the bank must look at an additional expenditure of 3,000,000 to get any return from Deadwood. . . .

Carroll went on to predict that EEC would receive one more progress payment "before the plug is pulled on Deadwood."

The memo implies that EEC's failure to perform was not caused by the alleged failure of Credit Suisse and Nugget to disclose project difficulties or the alleged refusal of Credit Suisse and Nugget to approve "change orders," i.e., extra compensation, for unanticipated problems. Instead the memo indicates that EEC knew that it could not perform at the time it promised to do so and suggests that EEC's breach of the workout agreement was a foregone conclusion from the outset.

In light of the nexus between the deliberately withheld memo and EEC and AHA's position in this suit, the prejudice to Credit Suisse and Nugget resulting from a three year delay in the discovery of the memo, and the ineffectiveness of previous discovery sanctions, the Magistrate recommended that the court enter "terminating" sanctions against EEC pursuant to Federal Rule of Civil Procedure 37(b)(2)(C) and against AHA pursuant to the court's inherent power. (*See* Findings and Recommendations filed March 16, 1994.)

In addition to receiving objections to the Magistrate's recommendation from EEC and AHA, Bruce Brown, Calpine, Will Betchart, Enervest Management Corporation, and Enervest

Corporation filed requests for inclusion in the benefit of the sanctions. The court recommitted the matter to the Magistrate. The Magistrate, following a second hearing, amended his recommendation to include Bruce Brown, Clapine, Enervest Corporation, Enervest Management Corporation. (*See* Findings and Recommendations filed April 22, 1994.)

On objections from the Magistrate's recommendations, EEC principally contended that there was no nexus between its misconduct and its claims and defenses which the Magistrate recommended striking. AHA, while apparently conceding a nexus between its misconduct and the adopted defenses of EEC, principally argued that there was no nexus between its misconduct and its defense that Credit Suisse and Nugget failed to notify it of changed project conditions which bore on the risk to the performance bond. On June 24, 1994 the court overruled the parties' objections and entered default sanctions against EEC and AHA. (*See* Order Adopting the Magistrate's Findings and Recommendations filed June 24, 1994 (the "June Order").)

On December 9, 1994, EEC filed a "Motion for Imposition of Sanctions Against Credit Suisse, Bruce Brown and Their Attorneys Latham and Watkins For a Fraud on the Court by Discovery Abuse" before the Magistrate.[6] The motion seeks reconsideration of the court's entry of terminating sanctions against EEC and the imposition of sanctions against Credit Suisse, Bruce Brown and their attorneys. The Magistrate denied EEC's motion for sanctions and recommends that the court deny

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6. EEC's motions have been mooted in part by Nugget's voluntary dismissal of its claims against EEC. (*See* Order After Hearing filed January 27, 1995.)

the motion for reconsideration. (*See* Findings and Recommendations filed December 21, 1994.)

II. Discussion

EEC makes two interrelated objections to the Magistrate's recommendation that the court deny its reconsideration motion and the Magistrate's denial of its motion for sanctions. Each is directed at undermining the connection between the Carroll memo and EEC's dismissed claims and defenses. Each requires that which EEC forfeited by abusing the procedures of this court and casting doubt upon the court's ability to fairly decide this case: litigation of the merits.

A. The Kelly Gale Notes

EEC first argues that Credit Suisse misrepresented the significance of the Carroll memo to the court. EEC claims that Credit Suisse wrongly argued that the Carroll memo proves that EEC knew of construction problems which were unknown to Credit Suisse at the time of the Workout Agreement. EEC concludes that the court, taken by Credit Suisse's misrepresentation, improperly sanctioned EEC.

EEC relies on a statement made by Credit Suisse in arguing for default sanctions before the Magistrate:

> [The Carroll memo] actually flips the case to the point where the truth is that EEC is the one with the superior secret knowledge, that it was not making available to the owner and the lender — as it should be.
>
> I mean, the contractor on the job is the expert in this area is the one you would expect to have

> superior knowledge rather than New York bankers and, you know, their on-site engineer who's visiting the site once every week or two.

Transcript, Evidentiary hearing, February 25, 1974 at 78-79.

EEC contrasts the statement with notes taken by Kelley Gale, a Credit Suisse attorney, during the pendency of the Workout Agreement negotiations. The Gale notes describe problems facing the project at the time of the Workout Agreement.

EEC would have the court draw the following conclusions from the comparison: that the Gale notes show that all parties to the workout agreement knew the project faced problems and that Credit Suisse knew that there was a substantial likelihood the project could not be completed on time or for the budgeted amount; that EEC therefore did not have "superior secret knowledge" about the feasibility of Deadwood; that the Carroll Memo is therefore insignificant; that Credit Suisse overstated the significance of the Carroll memo and misled the court; that terminating sanctions were therefore improvidently granted; and that Credit Suisse should be sanctioned for misleading the court.

EEC's argument is flawed in several respects. First, EEC mistakenly assumes that EEC was sanctioned because the court accepted Credit Suisse's representation that EEC had "superior secret knowledge" of construction problems at the time of the Workout Agreement.[7] There, EEC misperceives the basis on

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7. It does not appear, as EEC contends, that Credit Suisse argued that EEC had "superior secret knowledge" of project conditions. Rather, (Cont'd)

which terminating sanctions were entered. EEC was not sanctioned because of what the Carroll memo shows it knew relative to what Credit Suisse knew about the project at the time of the Workout Agreement. EEC was sanctioned because the Carroll memo subverts the position it took in its pleadings.

As explained in Part I, *supra*, EEC maintained that Credit Suisse and Nugget's wrongful conduct prevented it from performing its obligation under the Workout Agreement. EEC contended that it was misled by Credit Suisse about project conditions and that EEC did not approve change orders for "unanticipated" problems.[8] EEC was sanctioned because it hid a document which contradicts those assertions; the Carroll memo shows that EEC knew it could not perform when it signed the Workout Agreement.

Credit Suisse's knowledge at the time of Workout Agreement is irrelevant to the propriety of the terminating sanction. Nothing that Credit Suisse might have known could ameliorate EEC's wrongful suppression of the Carroll memo.

(Cont'd)
Credit Suisse argued that, in light of the Carroll memo, Credit Suisse did not have "secret" information about the project that it concealed from EEC as EEC contended in its pleadings. The point, however, is inconsequential.

8. EEC contends that it never asserted that Credit Suisse concealed project difficulties from it. It claims that Credit Suisse falsely attributed that position to it (EEC). However, the fourth cause of action in EEC's third party complaint alleges Credit Suisse conspired "to conceal from EEC facts material to performance of obligations on the project." (Second Amended Compl. for Counterclaims and Third Party Claims of Defendant Electric Engineering Company ¶ 39.)

Nor would anything that Credit Suisse might have known detract from the Carroll memo's impact on EEC's own pleadings.

Placed in proper prospective, EEC's contention that Credit Suisse knew of project difficulties at the time of the workout Agreement can only be viewed as an attempt to litigate the merits of its (EEC's) stricken claims and defenses. By suppressing the Carroll memo, however, EEC surrendered its right to be heard on those claims and defenses. *See Ins. Corp. of Ireland v. Compangnie Des Bauxistes*, 102 S. Ct. 2099, 2106-07 (1982) (observing that Rule 27(b)(2)(C) effects a "constructive waiver" of claims and defenses "specifically related" to suppressed evidence); *see also Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

Nevertheless, it is worth noting that EEC's conclusions about Credit Suisse's knowledge regarding the project's prospects are not supported by the Gale notes, by Bruce Brown's deposition testimony, or by the record. There is simply nothing in the record which indicates that Credit Suisse knew or should have known that there was a substantial likelihood that EEC could not complete Deadwood for the agreed price. Moreover, even if there were such evidence, it would be of no legal significance. The Carroll memo shows that EEC was well aware of project difficulties at the time it entered the Workout Agreement. Thus, the memo belies any contention that Credit Suisse concealed the project's difficulty from EEC.

This branch of EEC's motion for reconsideration is denied.

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B. Due Process Considerations

EEC next contends that the change orders submitted and delays suffered after the Workout Agreement concerned problems not anticipated in the Carroll memo. EEC also argues that the deposition testimony of Bruce Brown verifies the validity of its change orders.[9] EEC submits that, therefore, there is no nexus between the memo and its stricken claims and defenses. EEC, however, misapprehends the standard under which a Rule 37(b)(2)(C) motion is judged.

For the Rule 37(b)(2)(C) sanction to comport with due process, there must be a nexus between the sanction, EEC's misconduct, and the matters in controversy. *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 381 (9th Cir. 1988); *see also Ins. Corp. of Ireland*, 102 S. Ct. at 2105-08. In arguing that its change orders concerned problems unanticipated in the Carroll memo, EEC construes "nexus" too stringently. EEC would require that the wrongfully withheld evidence completely disprove its claims and defenses. That is not required.

"Nexus" in this context is shorthand for the due process principle that "the misconduct penalized must relate to matters in controversy in such a way as to interfere with the rightful decision of the case." *Halaco*, 843 F.2d at 381; *see also G-K Properties v. Redevelopment Agency of the City of San Jose*, 577 F.2d 645, 648 (9th Cir. 1978) ("[D]ismissal does not offend due process when, as here, the dismissal is a sanction for the suppression or failure to produce the proof ordered, when such

9. EEC fails to indicate which part of Mr. Brown's testimony concedes that EEC's change orders were valid. In fact, it appears that Mr. Brown believed that the change orders were invalid. (Brown Dep. at 171.)

proof concerned the rightful decision of the cause."). To interfere with the rightful determination of a matter in controversy, the wrongfully withheld evidence need not, as EEC implies, establish the invalidity of the EEC's position. *See Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 591 (9th Cir. 1983) (rejecting plaintiff's argument that its misconduct and a resulting dismissal sanction were unrelated to the matter in controversy because, "[a]lthough [plaintiff's] illegal conduct *could not be raised as a complete bar to [plaintiff's] antitrust action*, [defendant] could have used [the withheld] evidence to controvert the existence of damages or limit the amount.") (emphasis added). It need only be relevant to the matter's proper determination.[10]

For the reasons indicated in the Magistrate's Findings and Recommendations filed March 16, 1994; in the court's June Order; and in Parts I and II.A., *supra*, EEC's violation of the court's discovery order threatened the rightful determination of all of EEC's claims and defenses including EEC's claim and defense that Credit Suisse and Nugget wrongfully refused its change orders. The Carroll memo reveals that EEC knew it could not complete Deadwood for the bid price at the time of the Workout Agreement. The memo therefore suggests that EEC's change requests were not valid.

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10. Moreover, requiring Credit Suisse and Nugget to disprove EEC's claims and defenses would sap Rule 37 of its deterrent effect, *see generally National Hockey League v. Metropolitan Hockey Club, Inc.*, 96 S. Ct. 2778, 2781 (1976) (holding that Rule 37 was designed to discourage the flouting of court discovery orders by punishing offenders within the confines of due process), and would defeat the purpose of the sanction, *see Ins. Corp. of Ireland*, 102 S. Ct. at 2106 (stating that the intentional failure to produce ordered discovery results in a conclusive presumption that claims and defenses related to the ordered discovery were brought in bad faith and lack merit).

Appendix G

EEC's conduct interfered with the rightful determination of its "change order" claim and defense even if, as EEC suggests, the problems reflected in the change orders do not correspond with problems anticipated in the Carroll memo. Credit Suisse and Nugget could have used the Carroll memo to argue that the problems for which change orders were sought, though not specifically enumerated in the Carroll memo, fall within the general concerns expressed in the memo; they could have disputed EEC's characterization of the problems described in the change orders; and they could have contended that EEC's default was inevitable. Moreover, it is unlikely that the court would have suffered EEC to complain of Credit Suisse and Nugget's alleged improper refusal of the change orders in light of its intentional misrepresentation that it could complete Deadwood for the bid price. By suppressing the memo, EEC forfeited it right to litigate those issues. *See Ins. Corp. of Ireland*, 102 S. Ct. at 106.

It is also worth noting, however, that EEC's comparison of the Carroll memo and its change orders appears disingenuous. The Carroll memo describes penstock installation, access to the installation sites, and Forest Service permitting and approval as significant problems:

> The installation of the penstock could cost two or three times the bid amount. Given the indefinite state of the Forest Service approvals, it is impossible to obtain solid bids from pipe installation contractors.
>
> . . . .
>
> The two inlets for Deadwood are located in incredibly difficult terrain, several thousand feet from the nearest dirt road access. The only access for construction materials and heavy loads will be

> by yarder or rail system. The first 600 feet from each inlet must be constructed almost in the stream channel. We must suspend approximately 90 feet of pipe from the Deadwood creek inlet across the Owl Gulch channel. . . .
>
> Nine thousand feet of Deadwood penstock must be delivered several thousand feet down a 1:1 slope and then delivered horizontally to its installation point.
>
> . . . .
>
> Access to the Deadwood powerhouse is by boat or a 2000 foot rail or yarder system.
>
> See the accompanying report for concerns that Forest Service has about penstock construction.
>
> I am scared to death at the cost of constructing Deadwood. We have little time to experiment to find the best methods. We have limited resources with which to do the job.
>
> It appears to me that the bank must look at an additional expenditure of 3,000,000 to get any return from Deadwood. . . .

It appears that the majority of change orders submitted by EEC concerned Forest Service requirements, access to the installation sites, and penstock design and construction.

EEC's motion for reconsideration is denied on this argument.

C. Other Arguments

EEC argues that it was prejudiced by the Magistrate's refusal to compel Credit Suisse and Nugget to submit argument

and evidence in opposition to its motion for reconsideration and its motion for sanctions. EEC also argues that it had no reason to hide the Carroll memo. These arguments do not merit comment.

D. Motion for Sanctions

EEC moved before the Magistrate for terminating sanctions against Credit Suisse on the grounds that Credit Suisse misrepresented the significance of the Carroll memo; did not produce the Kelley Gale notes in discovery; and misled the court about their knowledge of project problems. The Magistrate's denial of that motion is affirmed. In light of the court's denial of EEC's motion for reconsideration, EEC's motion for sanctions is moot.

ORDER

For the foregoing reasons the court denies EEC's motion for reconsideration and affirms the Magistrate's denial of EEC's motion for sanctions. With this disposition, EEC's participation in these proceedings has concluded. However, the court will not enter final judgment as to EEC until the remainder of the case has come to judgment. In the interim, the court will not entertain further motions from EEC.

IT IS SO ORDERED.

Dated: March 3, 1995

s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX H — ORDER ADOPTING THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED JUNE 23, 1994 AND FILED JUNE 24, 1994

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV. NO. S-91-0008 EJG/PAN

VALLEY ENGINEERS, INC.,

Plaintiff,

v.

ELECTRIC ENGINEERING COMPANY, et. al.,

Defendants.

ORDER ADOPTING THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

This matter came before the court on objections to Magistrate Judge Peter A. Nowinski's Findings and Recommendations that terminating sanctions be entered against Electric Engineering company ("EEC") and American Home Assurance ("AHA") for abuse of the discovery process. After reviewing the Findings and Recommendations, the parties' objections and responses to objections, and the exhibits and transcripts from hearings conducted by the Magistrate, the court has determined that oral argument would not be of material assistance to the resolution of this matter.

Appendix H

FACTS

On July 15, 1988, EEC contracted with Enervest corporation to design and construct four hydroelectric power plants in California. On October 24, 1988, Enervest assigned its rights and obligations under the contract to Nugget Hydroelectric, L.P., a California Limited Partnership. Credit Suisse financed the project and hired Calpine Engineering Company to monitor the project. AHA, EEC's surety, executed payment and performance bonds in the amount of $1,983,000 each.

After delays in starting construction, EEC, Nugget, and Credit Suisse entered a "workout agreement" to reduce the scope of the project. The parties agreed that only one hydroelectric dam would be constructed and that the contract price for that dam would be increased from $1,983,000 to $2,543,800. On May 23, 1,989, AHA executed a surety rider increasing the amount of the bonds to $2,543,800 each.

On December 8, 1989, Nugget terminated EEC for defaulting on the contract. The present litigation began in the Yuba County Superior Court when Valley Engineers, Inc., a subcontractor on the project, sued EEC and AHA for $211,494.24 in unpaid labor and materials.[1] The case was removed to the Eastern District on the basis of diversity of citizenship. EEC then counterclaimed against Valley and impleaded Bruno Dietl (an officer of Valley), Credit Suisse, Bruce Brown (a Credit Suisse vice president), Calpine, William Betchart (Calpine's engineer, who monitored the project), AHA, and Enervest (the general partner of the Nugget limited

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1. Credit Suisse subsequently purchased this claim from Valley.

partnership). The second amended counter and third party complaint (filed April 15, 1992) alleges that the named parties intentionally interfered with EEC's contractual relations with Nugget; the named parties interfered with EEC's prospective business advantage; the named parties conspired "to conceal from EEC facts material to the performance of its obligations on the project;" and that Credit Suisse and Nugget negligently supervised the project. The counter and third party complaint also seeks a declaration that EEC did not wrongfully default on its contractual obligations to Nugget. On December 13, 1991, Credit Suisse cross claimed against AHA for payment on the performance bond.[2]

On November 24, 1989, Nugget filed for bankruptcy under Chapter 11. On June 7, 1990, Nugget filed an adversary proceeding against EEC and AHA. The adversary complaint alleges that EEC breached the construction contract by failing to complete the hydroelectric dam; that EEC fraudulently represented that it was competent to undertake the construction project; that EEC negligently failed to properly design the dam and negligently failed to complete the project on time; and that, due to EEC's default, AHA owes payment on the performance bond. With the approval of the bankruptcy court, Credit Suisse purchased Nugget's claims. The court then withdrew the adversary proceeding from the bankruptcy court and consolidated it with the instant case.

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2. Credit Suisse's cross claim also alleged that AHA breached the implied covenant of good faith and fair dealing by refusing to make good on the performance bond as soon as it ascertained that EEC had defaulted on the construction contract. That cause of action was dismissed on March 27, 1992.

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AHA filed a separate suit against Enervest, Enervest Managenent, Credit Suisse, and Nugget. AHA's first amended complaint seeks a declaration that AHA is not liable for payment on the bonds because the construction contract was materially altered without notice to AHA; because Credit Suisse negligently overpaid EEC increasing AHA's liability; and because defendants did not notify AHA of EEC's termination. AHA also asks for a declaration that EEC was wrongfully terminated and that the wrongful termination discharges AHA's obligation on the performance bond. Finally, the complaint charges that Credit Suisse and Nugget fraudulently concealed facts from AHA bearing on the risk of the construction project. Credit Suisse filed a counter claim for payment on the performance bond.

EEC also filed a separate complaint against Credit Suisse, Enervest, and Enervest Management (the owner of Enervest). The complaint charges Enervest and Enervest Management with fraud, negligence, and breach of contract; charges Credit Suisse with negligent supervision; and charges all defendants with conspiracy to defraud. EEC and AHA's cases have been consolidated with the present case.

EEC's and AHA's abuse of the discovery process began in 1991 when they failed to respond to Credit Suisse's request for documents. Though due on August 27, 1991, EEC and AHA had not yet responded to the request when, on November 27, 1991, Credit Suisse moved to compel production. The Magistrate, on December 20, ordered EEC and AHA to respond within ten days and ruled that they had waived any objections to the requested production. The Magistrate also awarded Credit Suisse its fees and expenses as a sanction.

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In December 1993, Credit Suisse charged AHA and EEC with suppressing and destroying documents responsive to its July 1991 discovery request. Particularly, Credit Suisse accused EEC and AHA of deliberately withholding a memorandum from John Carroll (EEC's project manager) to Frances Royer (EEC's president) which is extremely damaging to the shared litigation interests of EEC and AHA. The memo, written during the negotiation of the Workout Agreement, explained to Royer that the cost of constructing the dam would exceed the bid price. Carroll also predicted in the memo that Nugget and Credit Suisse would terminate EEC shortly after execution of the Workout Agreement because of EEC's inability to complete the project. When confronted with the memo in his second deposition, Carroll testified that both he and Royer knew that at the time EEC entered the Workout agreement the cost of constructing the dam would exceed the $2,543,000 contract price by at least one million dollars.

Credit Suisse discovered the existence of the Carroll Memo when a document examiner — using sophisticated magnification and photographic techniques — deciphered the obliterated notes of AHA's attorney which referenced the memo on a document produced pursuant to Credit Suisse's July 1991 document request. AHA was compelled to produce its attorney's notes because it had waived privilege objections. After reviewing the evidence, the Magistrate found that EEC and AHA had deliberately suppressed discovery of the memo and that AHA tried to destroy evidence referencing the memo. Based upon his finding of willful misconduct on the part of EEC, the significance of the memo, and EEC's prior abusive conduct, the Magistrate recommends that, pursuant to Federal Rule of Civil Procedure 37(b)(2)(C), the court strike EEC's third party claims against Credit Suisse, strike EEC's claims

against Credit Suisse in EEC's consolidated action and enter default judgment on Nugget's claims against EEC in Nugget's consolidated action. Based on his finding that AHA deliberately destroyed evidence leading to the discovery of the suppressed memo, the Magistrate also recommends that the court, pursuant to its inherent power to insure the orderly administration of justice, enter default judgment on Credit Suisse and Nugget's claims against AHA for payment on the performance bond and that the court strike AHA's claims against Credit Suisse and Nugget in AHA's consolidated case.

In response to the Magistrate's recommendation, EEC and AHA filed objections and Credit Suisse filed responses to the objections. Also in response to the recommendation, Enervest, Enervest Management, Calpine, and Betchart requested the benefit of the recommended termination. The court recommitted the matter to the Magistrate to determine whether the recommendation should be modified. On April 22, 1994, the Magistrate recommended that the court strike AHA's and EEC's claims against those parties also, and that Bruce Brown, who was inadvertently omitted from the first Findings and Recommendations, also receive the benefit of the recommended sanctions.

AHA and EEC again filed objections and Credit Suisse, Enervest and Calpine filed responses. The court now considers the objections to the Magistrate's Findings and Recommendations.

DISCUSSION

Upon receiving findings of fact and recommendation for the disposition of a matter from a magistrate judge

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> [a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings and recommendations to which objection is made. A judge may accept, reject, or modify in whole or in part, the findings and recommendations made by the magistrate.

28 U.S.C. § 636(b)(1)(C).

I. Objections to the Magistrates Findings and Recommendations Filed March 36, 1994

The court first considers EEC and AHA's objections, to the Magistrate's initial recommendation of entering terminating sanctions in favor of Credit Suisse and Nugget.

A. Objections to Factual Findings

EEC contends that the record does not support the Magistrate's finding that EEC willfully suppressed the Carroll Memo. In order to enter terminating sanctions under Federal Rule 37(b)(2)(C), a party's failure to provide ordered discovery must be due to "willfulness, bad faith, or fault of the party." *Wyle v. R.J. Reynolds Indus.*, 709 F.2d 585, 589 (9th Cir.1983). Disobedient conduct not shown to be outside the control of the litigant is sufficient to demonstrate fault. *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir.1993).

The court finds that the weight of the evidence — catalogued in the Magistrate's Findings and Recommendations and in Credit Suisse's responses to the objections — supports the finding that EEC deliberately suppressed the Carroll Memo.

In fact, considering (a) the significance of the memo to the litigation, (b) the fact that EEC had six copies of the memo in various files, and (c) EEC's contention that the document was included among five boxes produced to (and then recovered from) Calpine in conjunction with the fact that the memo did not appear in EEC's subsequent production to Credit Suisse, the Magistrate's finding that EEC deliberately withheld production of the Memo to Credit Suisse is the only reasonable one. The court accepts the Magistrate's finding.

AHA similarly contends that the record does not support the Magistrate's finding that AHA deliberately obliterated the reference to the Carroll Memo contained in Mr. Bunim's May 1990 notes after AHA had waived its privilege claims. In order to enter terminating sanctions under the court's inherent power to insure the orderly administration of justice, the objectionable conduct must be willful. *Halaco Engineering Co. v. Costle*, 843 F.2d 376 (9th Cir.1988).

Again, the weight of the evidence as set forth in the Magistrate's Findings and Recommendations and in Credit Suisse's response to AHA's objections supports the Magistrate's finding of willfulness. Mr. Bunim testified that he crossed out the reference in his notes to the Carroll Memorandum at the time the notes were made and not after AHA had waived privilege objections to Credit-Suisse's document request. However, in light of (a) the significance of the Carroll Memo, (b) the fact that other "cross outs" made by Mr. Bunim were still legible, and (c) the fact that the reference to the Carroll Memo was obliterated in a different color ink than that in which the notes were written, Mr. Bunim's testimony is not credible. The court adopts the Magistrate's finding that AHA willfully obliterated the notes to prevent Credit Suisse from discovering the Carroll Memo.

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Both EEC and AHA object to the Magistrate's finding that they conspired to suppress the Carroll Memo. The court need not consider this objection because a finding of concerted action is not necessary to support the Magistrate's recommended sanctions; each parties' conduct examined separately warrants terminating sanctions. However, the Magistrate's finding of concerted action is supported by Mr. Bunim's conversation with EEC's attorney during which he took the subsequently obliterated notes referring to the Carroll Memo and is corroborated by the parties' attempts to hide the Memo.

B. Objections to Legal Conclusions

EEC and AHA contend that the Carroll Memo is unrelated to the factual allegations predicating their claims and defenses. To comport with due process, the Rule 37(b)(2)(C) terminating sanction "must be specifically related to the particular claim[s and defenses] which [were] at issue in the order to provide discovery." *Fjelstad v. American Honda Motor Co., Inc.*, 762 F.2d 1334, 1342 (9th Cir.1985).

Here, EEC does not dispute that Credit Suisse's document request on which the Magistrate has ordered production (and which EEC has violated by suppressing documents) relates to all of its claims against Credit Suisse and to all of its defenses to the claims of Nugget. Moreover, contrary to EEC's assertion, the Carroll Memo undermines all of EEC's claims, and defenses. Each of the five claims asserted against Credit Suisse in EEC's third party complaint allege that Credit Suisse's wrongful conduct — such as refusing to authorize payment for "extra costs" and misrepresenting the cost of the construction at the time of the workout agreement — prevented EEC from performing its construction contract with Nugget. The Carroll

Memo indicates that EEC knew that it could not perform the contract at the agreed price at the time it entered the workout agreement. Thus, the Memo suggests that EEC's inability to perform was not caused by Credit Suisse or by unforeseen circumstances, but by EEC's own imprudence. EEC's defenses to the claims of Nugget in the consolidated case are conceptually identical to its claims against Credit Suisse. For the reason outlined above, the Carroll Memo is also specifically related to those defenses. Accordingly, the court finds that the recommended sanctions comport with due process.

In order to enter terminating sanctions against AHA under the court's inherent power, there must be a nexus between AHA's misconduct and the matter in controversy. *Halaco Engineering Co. v. Costle*, 843 F.2d 376 (9th Cir.1988). Again, there is a nexus between the evidence AHA attempted to suppress and AHA's defenses to Credit Suisse's and Nugget's suits for payment on the performance bond.

AHA does not object to the Magistrate's finding of a nexus between its attempt to suppress discovery of the Carroll Memo and its defense that EEC was wrongfully terminated. AHA argues that there is no connection between its egregious conduct and its defense that Credit Suisse and Nugget breached their duty to disclose "changed" conditions impacting the risk to the bond during the performance of the contract. The court, however, finds a nexus between AHA's attempt to suppress the Carroll Memo and the duty to disclose changed conditions. The Carroll Memo reveals that EEC anticipated the so called "changed" conditions at the time it entered the workout agreement. The conditions leading to EEC's default were not unanticipated, but within the contemplation of EEC at the time it entered the contract. Because there were no "changed"

conditions, Credit Suisse and Nugget did not have a duty of disclosure. If AHA was misled, it was by EEC's agreement to do a $3.5 million job for $2.5 million. Moreover, the bond provides that AHA waives notice of alterations to the project. The Magistrate found that AHA obliterated a marginal notation on a document it was required to produce that admitted AHA had waived notice to the changed conditions claimed by EEC. The court therefore finds that a nexus exists between AHA's wrong conduct and its "changed conditions" defense.

Both EEC and AHA object to the Magistrate's conclusion that their abusive conduct prejudiced Credit Suisse and Nugget and that a lesser sanction would be ineffective.

The court must balance five factors in determining whether terminating sanctions against EEC are warranted under Rule 317(b)(2)(C). *See Adriana Intern Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir.1990). Only two of the five factors — the risk of prejudice to the other party and the availability of less drastic sanctions — are fact sensitive and those two factors are dispositive. *Id.* Similarly, the court must consider prejudice and the availability of lesser sanctions before entering terminating sanctions against AHA pursuant to its inherent power.

The Magistrate determined that

> [t]he only conceivable alternative sanction is a monetary award to Credit Suisse to reimburse its attorney fees for all of the time spent uncovering EEC's shenanigans and Credit Suisse's cost of delay. To determine such a sanction, however, would require protracted judicial proceedings that would exacerbate the burden upon scarce judicial

> resources already imposed by EEC and would further delay determination of the merits of the parties' dispute. In any event, at this point Credit Suisse is entitled to an inference from EEC's conduct that the Carroll memorandum belies EEC's factual claims; entering EEC's default now only expedites the result that would follow if that inference were successfully invoked later at trial. But most importantly, as the court has found that EEC is guilty not of mere neglect but of active concealment of critical evidence, EEC's conduct in the litigation has cast such a pall upon EEC's integrity and upon a fair and just resolution on the merits that no alternative sanction could be effective . . . [I]f the case were allowed to proceed, because of EEC's past conduct in this matter there could never be reasonable confidence that the merits had ever been fairly decided.

The court finds the Magistrate's determination a perfect expression of both the risk of prejudice to Credit Suisse and Nugget caused by EEC's conduct and the inappropriateness of lesser sanctions. The court also finds that the determination applies with equal force to AHA.

Next, AHA and EEC argue that they should not be punished for the conduct of their attorneys. The Ninth Circuit, however, has repeatedly rejected that argument.[3] *See Malone v. U.S. Postal Service*, 833 F.2d 128, 334 (9th Cir.1987). As the *Malone*

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3. EEC argues that California and Florida law do not permit dismissal or default sanctions for an attorney's acts that are not, authorized by the client. The entry of sanctions, however, is a procedural matter and the court is governed by federal, not state, law.

court noted, "district courts cannot function efficiently unless they can require compliance with reasonable rules." *Id.* quoting *Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328, 1331 (9th Cir.1981).

EEC argues that it complied with the Magistrate's discovery order by producing the Carroll Memo to Credit Suisse's agent Calpine. However, there is no evidence to support EEC's contention that Calpine is Credit Suisse's agent. Moreover, the Magistrate found that Calpine returned the five boxes of documents to EEC before Calpine had read through all the documents. Calpine understood that it would get the documents back. When the documents were produced to Credit Suisse, the Carroll Memo was conspicuously absent. EEC's production of the Carroll Memo to Calpine does not exonerate EEC's conduct.

II. Objections to the Magistrate's Findings and Recommendations Filed April 22, 1994

A. EEC's Objections

The Magistrate's second Findings and Recommendations recommend extending the benefit of the terminating sanctions to Brown, Calpine, Betchart, Enervest and Enervest Management. They provided for the filing of written objections within twenty days after service. Allowing for three days for service, EEC's objections were due May 16, 1994. They were not filed until May 20, 1994. Accordingly, the court finds that EEC has waived objection to the Magistrate's second Findings and Recommendations.[4]

4. EEC argues that it was given two ten day periods to object. Therefore, they continue, Under Federal Rule of Civil Procedure 6, (Cont'd)

Appendix H

B. AHA's Objections

Of the parties requesting inclusion in the benefit of the sanction order, AHA only has claims against Enervest and Enervest Management; none of the requestors has claims pending against AHA. AHA objects to the dismissal of Enervest and Enervest Management on the same grounds it objected to the recommended terminating sanctions in favor of Nugget and Credit Suisse.

AHA again contends there is no connection between its wrongful conduct and its claims that Enervest and Enervest Management failed to notify AHA of changed conditions in the performance of the contract that affected the risk to the bond and that Enervest and Enervest Management fraudulently withheld information concerning changed conditions. For the reasons stated above, the court finds that there is a nexus between AHA's wrongful conduct and AHA's claims against Enervest and Enervest Management.

AHA also reasserts its objection to the Magistrate's factual findings. However, as noted above, the Magistrate's factual findings are supported by the weight of the evidence.

ORDER

For the foregoing reasons, EEC and AHA's objections to the Magistrate's Findings and Recommendations are overruled and the Findings and Recommendations are adopted. Accordingly, the clerk is directed to

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(Cont'd)
weekends should be excluded in calculating the deadline. The court rejects this construction of the Rule 6 and of the Magistrate's twenty day time limit.

Appendix H

1. strike EEC's claims against Credit Suisse, Bruce, Brown, Calpine, William Betchart, and Enervest Corp. and enter judgment by default on Credit Suisse's claim against AHA in *Valley Engineers v. Electrical Engineering Co., et al.*, CIV. NO. S-91-0008 EJG/PAN;

2. enter judgment by default on Nugget's claims against EEC and AHA in *Nugget Hydroelectric v. Electrical Engineering Co., et al.*, CIV NO. S-93-1594 EJG/PAN;

3. strike AHA's claims against Enervest Corp., Enervest Management Corp., Credit Suisse and Nugget in *American Home Assurance Company v. Enervest Corp., et. al.*, CIV. NO. S-90-0684 EJG/PAN; and

4. strike EEC's claims against Credit Suisse, Enervest Corp. and Enervest Management Corp. in *Electrical Engineering Co. v. Enervest Corp., et al.*, CIV. NO. S-90-0159 ELG/PAN.

IT IS SO ORDERED.

Dated: June 23, 1994

s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I — TRANSCRIPTION OF TAPE-HEARING DATED MARCH 14, 1997 IN *VALLEY ENGINEERS, INC. v. EEC THREE JUDGE PANEL* DATED MARCH 14, 1997

[1] PANEL: Now I see a lot of attorneys listed here arguing first, second and third, and who do we have here.

I'm Mark Pomeranz Your Honor.

PANEL: And you are representing?

POMERANZ: Electric Engineering Company, the appellant.

PANEL: And then, um, are you sharing time with other co-counsel?

POMERANZ: Other counsel are here, and I see them sitting back there so I would assume. . . .

PANEL: How we are allocating the twenty minutes per side?

POMERANZ: I would do fifteen minutes and then there'll be five minutes reserved for the other team.

PANEL: Alright, and then the other team will allocate within their own time so that the cumulative time is no more than twenty minutes. Alright counsel, you may proceed.

POMERANZ: Thank you Your Honor. The first issue that we're here on is that the District Court

erred in failing to consider on the merits Electric Engineering Company, or EEC's claims for declaratory relief against American Home Assurance Company.

PANEL: Why isn't that issue now moot?

POMERANZ: Well, that's a good point Your Honor, it's one that I believe that may very well be moot but nonetheless, the court never. . . .

PANEL: As I understand what happened here, the court entered an Order dismissing all of EEC's claims against the other parties, and entered a Default Judgment as to liability in favor of the Plaintiffs against EEC.

POMERANZ: Yes.

PANEL: Subsequently the remaining Plaintiffs, I think Credit Suisse, filed a motion which was granted to dismiss its claims against EEC. Is that true?

POMERANZ: Yes it is.

[2] PANEL: So when that Order was granted, there were no claims against EEC. Is that right?

POMERANZ: That is correct.

PANEL: Now in the crossclaim against AHA, you had asked for a declaration as to whether you were liable to the Plaintiffs.

POMERANZ: Your Honor, what the crossclaim was I believe is that we wanted to find out whether American Home Assurance had liability under the bond.

PANEL: And it would have liability only if you were liable?

POMERANZ: Correct. We were cleared on liability as of . . .

PANEL: So is there now and was there after that Order any live controversy as to which you had an interest?

POMERANZ: Well we believe there was a controversy not before the California court but there was another matter that we have taken up in New York where we. . . .

PANEL: We're only talking about this case. Was there a live controversy in this case?

POMERANZ: There was nothing else expressed except that the judge regularly expressed opinions. . . . moot by putting in an Order. . . .

PANEL: Well, so your quarrel is that when, you've told us in supplemental briefs, that all the claims that have been dismissed by the

court or, judgments filed as to all claims, including crossclaims, and your quarrel is that the court didn't expressly say and the crossclaim is dismissed and moot. Is that why you're here?

POMERANZ: On that issue because out of history, the court had in the past. . . .

PANEL: Can't we affirm the court on the basis that it's moot without having an expressed statement?

POMERANZ: If that's the case, I will gladly move on to the next issue Your Honor. Moving along to the Calpine and Intervest issues, I will call them Intervest for ease today. . . .

PANEL: Could we also be sure that we hear from you on the jurisdictional issue?

POMERANZ: Sure, I'm there.

PANEL: It seemed to me from reading the four responses that everyone is [3] sort of dancing around the absence of a Final Order issue here and I gather that the consensus is that well, there may or may not be a Final Order but everyone thought they had a Final Order, but why bother? Is that sort of your position?

POMERANZ: Well, I, yes it is, well there's several reasons. The court, actually based on its actions, showed finality. It seems to have been the intent of the lower court and as you said it seems to have been a unanimous waiver among all the parties.

PANEL: Did all the parties sign the waiver?

POMERANZ: There are no signatures to a formal written waiver that I am aware of Your Honor?

PANEL: Nobody's left out?

POMERANZ: I'm sorry?

PANEL: One the 41 Motion, did all parties sign that?

POMERANZ: Yes, only two parties signed that would have been Credit Suisse and American Home Assurance Company.

PANEL: Does the district court have jurisdiction to act on that 41 without all the parties signing?

POMERANZ: Based on the Rule 41 as it's specifically written and as you specifically questioned, I don't know that they, I don't think that they do.

PANEL: Well, if they don't, everything that happens after that is nothing, a nullity. Now talk about jurisdiction in light of that.

POMERANZ: I'm not sure I understand what Your Honor was saying, but. . . .

PANEL: Well any Order pursuant to a 41 stipulation that is not signed by all the parties is not a valid Order. There's no authority in the hands of the district court to enter an Order pursuant to a stipulation that's not signed by all the parties.

POMERANZ: Correct.

PANEL: So the Order is void.

[4] POMERANZ: Okay.

PANEL: Now how can we go on to a Final Judgment, when the Order pursuant to the stipulation is ineffective?

POMERANZ: Well, because I believe that there is an exception to that and that is that the actions of the court showed that it was their intent that it be a Final order and that everyone waived that there were not signatures to it and I believe that. . . .

PANEL: Where do I find those waivers?

POMERANZ: I believe in response you would ask for everybody. . . .

PANEL: In the record before the district court.

POMERANZ: There would have been none Your Honor and the reason there wouldn't have been is because Electric Engineering Company, at least I can speak on their behalf, was blind-sided by that Order the day before an appeal would run, opportunities . . . the matter back before the district court was not there with 24 hours time and with a 10 day . . . hearing period having passed as far as we evaluate it, we had 24 hours to file an appeal otherwise based on prior actions with the district court, or we might have been foreclosed from any further. . . .

PANEL: Are you here in open court essentially offering to stipulate with all the other parties that you waived your signature on the Rule 41 motion?

POMERANZ: I will stipulate to that on behalf of Electric Engineering Company Your Honor.

PANEL: You have me confused. The parties can stipulate to dismiss an action in the district court. That's Rule 41.

POMERANZ: Correct.

PANEL: If a notice of appeal is filed and no Final Judgment has been entered pursuant to Rule 58, are you arguing that the failure of the parties to raise a Rule 58 violation can be waived. It is clear from what the district court did that it was its intent to enter a Final Judgment on all issues against all parties.

POMERANZ: Yes exactly Your Honor, yes Your Honor.

[5] PANEL: It, didn't sound like that when you were responding.

POMERANZ: At the end of our letter brief that we submitted, I believe that the last paragraph covers that point exactly.

PANEL: So is it your position that based on everything that occurred here, starting with the sanction order which dismissed EEC's claims and caused the court to enter a default against EEC as to liability, and then the court said that no Final Judgment will be entered until the damages issue has been taken care of. Is it your position that after the parties settled the damages issue, that the court intended to enter Final Judgment as to everybody?

POMERANZ: Yes Your Honor.

PANEL: So, from that then, it's your position and it sounded like everybody else agreed with you that we have appellate jurisdiction.

POMERANZ: Correct. For the Enervest and Calpine issues, I would believe that the district court has used its discretion in entering terminated sanctions Electric Engineering Company in their favor and basically what occurred on June 24, 1994, is an Order defaulting Electric Engineering Company's claims against Calpine Enervest or entered based on what I call two motions. They filed them after Credit Suisse and the parties to the matter had already obtained a sanction against Electric Engineering Company or at least had first gotten the findings and recommendations of the magistrate that he would do so.

PANEL: Give me some history here. Didn't you first have monetary sanctions for the first violation of the order and then this is the second one and the judge was faced with deciding whether or not there less drastic sanctions and concluded that under the circumstances no.

POMERANZ: I believe you're correct that there was an issue in the past, but not as it relates at all to Calpine and/or Enervest, and indeed the claims that we have against them were

different. Indeed, the court issued sanctions in December of 1991 for failure to produce any documents to an earlier Request for Production, the First Request for Production in that case and by prior counsel not having done so the court said now you must produce all documents, but that was in response only as to Credit Suisse. As to the Request for Production by Calpine, EEC provided all documents, including and specifically found by the magistrate, including the one very document that the court issued sanctions against EEC for not producing to Credit Suisse, the other [6] entity.

PANEL: You are not appealing any of the Orders with reference to Credit Suisse?

POMERANZ: That is correct.

PANEL: So you're not appealing the Order that the court issued that documents be produced to Credit Suisse, nor the subsequent sanctions that you were liable to provide to Credit Suisse. You're not appealing that?

POMERANZ: That's not been appealed. And so as to Calpine, they received the documents, they've got everything, in fact they just didn't get the documents, they got the originals. At that time, all original boxes

went to Calpine, Calpine had them and the court file for a period of months before then new counsel when they came on the case, same by and picked up their original boxes to take back. Only when going through those documents, and I believe they put them into binder form from the boxes and testified during the evidentiary hearing back in February, one at a time the documents were reviewed, went through each one and they determined that the responses, nonresponses, privileged or not, that document, the Caroll Memorandum as it's called, did not make it in response to that discovery and as a result, sanctions to Credit Suisse occurred. But, Calpine had it pursuant to their request, Enervest never made any request whatsoever of the document itself when reviewing it, though it was given the spin to favor Credit Suisse, the document in and of itself was given to Calpine, it was not worthy of a summary judgment alone, they've had it, they never raised a summary judgment issue, it would have been one of many documents that would have been presented before the trial, in a jury trial, but it would not have been a document that would have ended the entire case, but there's still issues of material fact to have been reviewed afterwards. Now another key thing is the hearing for Calpine Enervest was called, and I thought a hearing and not an evidentiary hearing, it

was called by the magistrate on April 20, 1994, and it was called two days later on the 22nd, it was sent out by mail. Fortunately, it was received by Electric Engineering Company who came to court on the 22nd, objected to the timeliness of it for an evidentiary hearing, but the magistrate said we are proceeding anyway. So we proceeded anyway on an evidentiary hearing as the court called it on that day, and at the conclusion of that evidentiary hearing, the magistrate came up with findings and advised and for responding to those and file objections, [7] how much additional time might be needed beyond what's regularly given, ten days. She responded an additional ten days. Therefore, there would have been then ten more days. If the court looks at it any way, as the original ten court days, if you look at it as ten calendar days thereafter or ten more court days, EEC timely filed its objections. On the other hand, if you look at it in the terms of that the colloquy between counsel and the magistrate for that ten additional day period was strictly a way of the magistrate saying no, we're cutting it from court days down to calendar days, the initial ten make the second ten also calendar days, if you look at it that way, then EEC was a few days late, but no prejudices occurred to anybody, as there was plenty of time between then and the

final hearing. So, Electric Engineering Company believes that it did not have a fair opportunity, one to have an evidentiary hearing, two to present objections to the findings of that evidentiary hearing and three, that the matter should never have been presented at all on these new two motions because Calpine received everything and really, there was no sanction that belonged against them nor Enervest, and if you look at the pleadings that Electric Engineering Company had against Calpine and Enervest, only one of five counts were any way related to that document, count number four out of the five, and as for Enervest, no count in any way related to that document.

PANEL: I'm having trouble getting a handle on your theory. Is your theory that the December, 1991 Order requiring production to Credit Suisse gave no notice to EEC that a violation of that Order would expose sanctions for other people?

POMERANZ: That is what the case law in Adrianis states. . . . yes Your Honor, that it needs to be a specific finding to a specific person, it can't be just general notice to the public for other areas and other requests for production.

PANEL: Is it your theory that only Credit Suisse had standing to seek the sanction for a violation of the order, the documents to be turned over to Credit Suisse?

POMERANZ: Yes it is.

PANEL: Counsel you've got three and a half minutes left.

My name is Mark Gentry, I represent Calpine Corporation. I'd like to briefly address the argument related to the court's authorities to extend or terminate injunctions in favor of Calpine. As counsel had [8] argued, he contends that the court lacked authority because Calpine did not procure the Order that EEC violated. I believe this court, in its decision in the Professional Seminar Consultants case, has rejected that contention, when it ruled that a Rule 107A motion is not a prerequisite to a Rule 37B. All that's required is that a discovery order be issued and violated, and that the sanction related to that hearing be. . . .

PANEL: But in that case, there was a discovery order issued between the parties before the court.

MG: There was a discovery order. . . .

PANEL: So it's not like this case, where a different party did not seek the discovery order while seeking sanctions.

MG: I believe the proposition of that case would extend the coverages. . . .

PANEL: As I understand the theory that under Rule 37 there's two ways there can be a sanction. One, is that a party request a motion to compel and an order issued, or if the court on its own motion says you give that party without an order, but in the case that you cite, um, the person who got the benefit of the sanction was the person who was seeking the discovery from the court. Is that true?

MG: That would be true.

PANEL: So that case doesn't help us with this problem, where you have people who didn't seek a discovery order=, motion to compel and were not named in the court's order requiring production, and is now seeking to benefit from sanctions imposed because of violation of the order as to persons who came in.

MG: I understand your point Your Honor, and perhaps I can address that by going into the issue of prejudice.

Appendix I

PANEL: Well, before we get to prejudice, I'm concerned about the fact that I've read that December order as you have. Is there anything in that Order that gave notice to EEC to the failure to produce documents to Credit Suisse would expose its sanctions to other people who were not before the court.

MG: There was nothing expressly in there, but under the circumstances because EEC asserted the same claims in its second amended [9] complaint against Calpine as it did against Credit Suisse, I think it would be assumed or expected that would prejudice Calpine. . . .

PANEL: I'm not quite sure if you answered my question. Is there anything in the text that gave notice to EEC that a violation of the order to produce to Credit Suisse would expose it to sanctions not named in the order.

MG: Not expressly Your Honor, no.

PANEL: Now, you heard my question, how does your client . . . who do you represent?

MG: Calpine Corporation.

PANEL: Alright now Calpine got discovery. There was a request without seeking the

assistance of the court, five boxes were given to Calpine, they had the boxes for many, many months, the boxes contained the documents that you now claim you should have had.

MG: Yes Your Honor.

PANEL: How is that a violation of anything? You didn't ask for a discovery order, and you got the documents, for which Credit Suisse was punished because Credit Suisse didn't get the documents.

MG: EEC was punished.

PANEL: Excuse me, EEC was punished for not turning over the Caroll Memo to Credit Suisse. But your client got the Caroll Memo.

MG: That's correct Your Honor. The magistrate found that Calpine's attorneys never saw the Caroll Memo. . . .

PANEL: Well, is that EEC's fault?

MG: Well, Your Honor, the magistrate also found that the production of the Caroll Memo to Calpine was a result of an early and momentary lapse in the persistent policy of suppressing the Caroll Memo. I believe the issue is whether the violation . . .

PANEL: What was that again, explain that to me? When you produce the document in response to a request by the other party, that's a momentary lapse so we don't count it as a production?

[10] MG: Your Honor, in this case I think the point the magistrate is making in making that observation is the production to Calpine wasn't, it was essentially an unintended act . . .

PANEL: So, you get sanctions for doing what you're supposed to do on an accidental basis?

MG: No Your Honor.

PANEL: Well that's what happened, that's what you seem to be arguing in court.

MG: That's not what I'm arguing Your Honor, what I'm arguing is that the subsequent act of EEC in the. . . . Caroll Memo from Credit Suisse, correct that it's Calpine . . .

PANEL: But you have it.

MG: As the magistrate found, Calpine didn't realize it had it.

PANEL: You had it. By an accidental delivery, you get sanctions. The sanction was for not surrendering the document. You had the

document and EEC gets sanctions, and that in their view, is an equitable, legitimate construction of discovery sanctions.

MG: Yes Your Honor.

PANEL: Boy, that's their fault.

MG: In this case, Credit, EEC concealed the memorandum from Credit Suisse . . .

PANEL: And got punished . . . but you got it.

MG: Your Honor, when Calpine's attorney surrendered the documents back to EEC, he requested that he be allowed an opportunity to review those documents again. In this case what happened in the interim was that Credit Suisse and Calpine's attorneys agreed to information.

PANEL: Credit Suisse got it too for all we know.

MG: Uh, well, that's not the findings of the magistrate, but I'd like to continue answering your questions but expired my time. . . .

[11] PANEL: Would someone else like to take over on this? Do you have anything else, or do you want to give other counsel an opportunity?

MG: Well, I would like to take a moment to address the prejudice issue because I think this is, to connect the sanctions to Calpine is the prejudice, and that existed here. This court has held that a party is prejudiced, that a defendant is prejudiced, when the plaintiff's actions join or interfere with rightful decision of a case, and EEC's actions with respect to Credit Suisse, threatened to interfere with the rightful decision of the case as to Calpine. As the district court found, EEC wilfully concealed the Caroll Memo and the Caroll Memo undermined all of EEC. . . . Calpine and Credit Suisse. As counsel for EEC just told you, those findings are not subject to challenge on this appeal. As a result of EEC's conduct, Calpine and Credit Suisse face the possibility of . . . against EEC's claims without the benefit of the Caroll Memo. This threatened to interfere with the decision case.

PANEL: You are giving from a position and time before or after you got the memo?

MG: I think that the only way that EEC's earlier production of the Caroll Memo to Calpine could exonerate it from its prejudice to Calpine by subsequently concealing it from Credit Suisse is if Calpine's attorney actually saw the memo. The finding was that Calpine never did.

Appendix I

PANEL: Yes it was the original copy wasn't it?

MG: Your Honor, no the magistrate's finding was that the original has never been produced. I would. . . .

PANEL: I'm sure you answered . . . Kanowitz' question. When did Credit Suisse become aware of the Caroll Memo? How was your client prejudiced from thereon in going to trial? It seemed your client would have been in a wonderful position to seek sanctions.

MG: Your Honor, you asked how my client was prejudiced, and I refer back. . . .

PANEL: You now caught EEC or their attorney from hiding a document.

MG: Right.

PANEL: So you were ready for summary judgment or to go to trial?

[12] MG: Your Honor, as the magistrate explained, the Caroll Memo wasn't. . . .

PANEL: I have trouble with the magistrate's order, so you'd better tell me what you think . . .

MG Okay. I'm sorry, I had a momentary lapse, could you rephrase the question.

Appendix 1

PANEL: How was Calpine prejudiced in this case after they found out the failure to give the Caroll document in terms of preparing for trial and going to trial, or filing motions.

MG: Your Honor, Calpine was prejudiced because EEC's conduct threatened to interfere. . . .

PANEL: You got the documents, you caught them. . . .

MG: This court case established that the last minute surrender of documents does . . . . prejudice. This kind of conduct does violate the true finding process and I think the magistrate in the district court had lost confidence that a rightful decision on the merits as possible. In fact, the magistrate referred to statements made by EEC's counsel to the effect that not all the documents may still have been produced. . . .

PANEL: The prejudice here really would have been against EEC, because they were caught playing games. That could have been presented to the judge on summary judgment or to the jury at a trial. Am I right?

MG: No Your Honor, I believe our client and Credit Suisse was prejudiced because

concealing material documents threatens to interfere with rightful decisions of any case.

PANEL: Thank you counsel.

My name is Mary Hewalt, I represent Enervest Corporation and Enervest Management Corporation. I think this issue of the prejudice obviously is a very important one, and I need to reiterate what my colleague said and "what the magistrate find", which is that: "because of EEC's past conduct in this matter, there could never be reasonable confidence that the merits had ever been finally decided." This is not a routine discovery dispute, this is a situation where a party refused to obey a court order to produce documents, it finally produced documents that did not include the key document we are talking [13] about . . .

PANEL: The Caroll Memo.

MH: The Caroll Memo. They actively removed the Caroll Memo from the files that is produced and it actively obliterated other documents that referred to the memorandum so that it would not be found.

PANEL: The sanction is the termination of claims against several defendants.

MH: Yes.

PANEL: And while it may be appropriate with respect to a defendant who was directly prejudiced, what about those defendants that actually got the document, whether they knew it or not. I think one has to assume that the attorney is responsible for finding out what's in the material that's been given.

MH: The purpose of the sanctions is to punish a egregious conduct that like that occurred in this case and also to deter a egregious conduct like that from occurring in the future. So what you have to look at is not whether the parties who benefited from the sanctions deserved to benefit from it, but whether or not the sanctions are appropriate to deter that kind of conduct in the future. That's the inquiry that we have to look at here, it doesn't matter . . .

PANEL: The dismissal of the claim in its entirely is sort of like a nuclear bomb. . . .

MH: It is like a nuclear bomb and the conduct that occurred in this case was so egregious was like a nuclear bomb. This was not one little piece of paper that was hidden, this

was the smoking gun, this was the document that said we, EEC, admit that we have no business being in this court. We, EEC, admit that we have no valid claims or expenses to pursuant before this court . . .

PANEL: Now, do we have enough record to support what you're just saying?

MH: The Caroll Memorandum is an admission by the project manager that. . . .

PANEL: Thy say that they have other evidence which would overcome the sting of that. We don't know, because you never got to that point.

MH: Perhaps, the point being I think, um, and I hope that Your Honor [14] won't disagree with me, that there may be other evidence but this document in and of itself was a key piece of evidence, I don't think that's disputed and that's what makes this conduct so egregious is that you need to actively and consciously, as found by the magistrate, to seal key evidence.

PANEL: If it was so clear, if it were so absolute, why upon the initial discovery of the Caroll document wasn't summary judgment filed? You say it would sustain that judgment.

MH: The first thing to deal with was the sanctions, and the dismissal precluded the sanctions and what's the point of going ahead and filing a summary judgment motion, and the inquiry of the sanctions as to Credit Suisse is significant, and I think that it more than likely reflects and acknowledgment of the propriety of the sanctions.

PANEL: One response to your comment that what would be the point of a summary judgment. Was there any evidence that the client was responsible for withholding or concealing or destroying the Caroll Memorandum?

MH: Ah yes, Mr. Caroll himself was deposed about his memorandum initially before it was found, and he denied any knowledge of it, and he was subsequently presented with the memorandum at which point he recalled having written it.

PANEL: Mr. Caroll is not the client.

MH: Ah, he was the project manager for EEC.

PANEL: What I'm getting at is that the court could have sanctioned the lawyers if they were responsible heavily and permitted the claims to go to trial, and then you could file your summary judgment and then point it out since you have that memo.

MH: The problem is that when you get into deciding summary judgment motions and you have a situation where you have no way of knowing whether all of the evidence has been produced during discovery, whether the evidence that is produced in opposition to the summary judgment motion is accurate or reliable because EEC's conduct, according to the magistrate, who reviewed evidence, has already reflected that it has no intention of being responsible with respect to discovery.

[15] PANEL: Well then you say that the Caroll Memorandum is not as conclusive as you've been arguing it. You say there is some factual matter out there would dispute a summary judgement.

MH: No, I'm not saying there is.

PANEL: Well, then if the Caroll Memorandum was conclusive you'd win a summary judgment hands-down, don't back off.

MH: I believe that's true, but EEC has argued to this court that there is some other evidence that could overcome it.

PANEL: That's right, and we don't know what's out there because we didn't go through the process.

MH: But even if we did go through the process we'd have no way of . . . the voracity of that evidence. The fact that the magistrate found that the true finding process has been undermined. There's no way that you can trust the evidence that's introduced in the future, and that's why the sanctions are so important, there's no alternative sanctions. They've been sanctioned two or three times before monetary sanctions and they still could suppress the documents.

PANEL: Your client never made an informal request for discovery?

MH: That's right.

PANEL: And your client never made a motion to compel.

MH: That's right. May I ask if we can reserve. . . .

PANEL: You have two minutes and twenty seconds left for your side.

MH: I would like to respond to the question but I feel I will go over the two minutes.

PANEL: You can respond to the question.

MH: My client properly, during the course of discovery, was working in concert with

and relying on discovery that was conducted by Credit Suisse. This is the reality of federal practice. It is common-place and it is typical, particularly in a situation like this where you have Credit Suisse, which is the financial institution that bank-rolled the project that my client. . . . They were undertaking the . . . or the discovery. My [16] client relied on the discovery it was conducting. The fact that each and every party to the lawsuit didn't file a separate discovery request saying I want the same documents that this party requested doesn't mean that they shouldn't get the benefit of sanctions, and doesn't mean that they're not entitled to rely on the discovery that is produced to other defendants. This is a reality and if you have an environmental lawsuit that has 200 defendants . . .

PANEL: But the flip-side of that, if it turns out that one party got the memorandum unintentionally, but nevertheless got it, does that mean presumably everybody else did?

MH: No, it doesn't mean that presumably everybody else did, particularly in this situation where the parties did not see the documents. . . .

PANEL: I have to assume that if it was delivered in a box which a lawyer never opened or never looked at that at least it was produced.

MH: There's some evidence that it was produced but then it was withdrawn. . . .

PANEL: The magistrate found that it was produced, that issue is behind us.

MH: Yes, yes, but it was also withdrawn when the documents were returned, and so other parties did not have an opportunity to review it.

PANEL: They had the opportunity but didn't take the opportunity.

MH: They didn't have the opportunity once the memo was withdrawn from the files . . .

PANEL: The boxes were there, and all the time they were there and all the parties had access to them because you're telling me that one discovery order is going to benefit lead counsel the entire defense operation.

MH: Right.

PANEL: Thank you. Counsel.

POMERANZ: There is more evidence and I hope to show the Honorable panel that Enervest really did very little on this case in the underlying manner because of some material misstatements to your Honor this morning, [17] number one: Electric Engineering Company was not sanctioned two to three times for not having produced, that was American Home that was sanctioned three times prior to that, also there is no evidence as Your Honor properly stated that the client, Electric Engineering Company, withheld the document indeed it seems that this was one document out of 30,000 produced that one of the law firms did not produce. . . .

PANEL: Now what's the story about it was produced apparently and then allegedly withdrawn. What's going on there?

POMERANZ: It wasn't a question of produced and withdrawn, the prior counsel before withdrawing from the case and being substituted in by the Diaz firm before leaving, he said well I have this request for production outstanding, here all of our original documents, he gave them the five original boxes with all documents in them . . .

PANEL: Including the Caroll memo.

POMERANZ: Including the Caroll memo.

PANEL: And this was delivered to whom?

POMERANZ: It was delivered to Calpine at Chris Gibson, attorney for Calpine's office.

PANEL: Did anyone else get it besides Calpine?

POMERANZ: Calpine was delivered the box, no Your Honor, the boxes went to Calpine.

PANEL: Now what's the story about the withdrawal that we just heard about from counsel.

POMERANZ: New counsel when they came on a few months later after the initial hearings on the case, they needed the boxes because they were the only ones, the originals, they didn't have any other copies of these documents, so they went over to get the copies of the documents or to take back their boxes. It wasn't that they were going over there to yank out the Caroll memorandum, this was part of the evidence that they came to retrieve, and that was picked up and taken back. Calpine again never requested those documents ever again.

PANEL: Never made copies?

[18] POMERANZ: That I don't know, we don't know, if they came to me I would have taken the time to look at them Your Honor, you picked up on that. If prior counsel says he didn't, then I will assume prior counsel did not but the proper handling of the matter when he took the time to request them with the Request for Production when Electric Engineering Company took the time to respond to the request and then to hold it for a period of many months as the court found and not look at the documents, I don't think that's a proper handling of the matter by Calpine and Electric Engineering Company should not be punished for that. Also, the reference that this was a "smoking gun" the court made an interpretation to the Caroll memorandum in favor of Credit Suisse that it had more significance than it otherwise would have had. There are other documents that are out there and I am saying there is evidence out there that could overcome a summary judgment motion, and so again this was given specifically in order to assist. Finally, the last statement made or one of the other statements that there was an active role in obliterating references to the documents. That was not by Electric Engineering Company, that was by the bonding Company, Sound American Home Assurance Co., so again Electric Engineering Company did not do those, a

notice regarding a draconian sanction such as this was not present and that was for Enervest and Calpine, the pleadings themselves as stated by prior counsel stated that it totally cut against the claim. There were claims against Calpine for negligent supervision of employees, interference with Electric Engineering Company's employees on the job, never discussed by the memo.

PANEL: Counsel, your time has expired.

POMERANZ: Thank you kindly Your Honor.

PANEL: The case just argued will be submitted for decision and this court will stand and adjourn.

APPENDIX J — RELEVANT STATUTES AND REGULATIONS INVOLVED

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FED. R. APP. P. 38 — Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

FED. R. CIV. P. 6(a) — TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a

day on which weather or other conditions have made the office of the clerk of the district court inacessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

FED. R. CIV. P. 6(e) — Time

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Appendix J

FED. R. CIV. P. 37(b)(2)(C) — Failure to Make Disclosure or Cooperate in Discovery; Sanctions

(b) Failure to Comply with Order.

. . . .

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

. . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including

attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 72(b) —
Magistrate Judges; Pretrial Orders

(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party

may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

LOCAL RULES OF THE DISTRICT COURT — EASTERN DISTRICT OF CALIFORNIA RULE 304(b) — MAGISTRATE JUDGES' AUTHORITY IN EXCEPTED PRETRIAL MATTERS

(b) Objections. Within ten (10) court days in civil actions and five (5) court days in criminal actions after service of the proposed findings and recommendations on the parties, see Fed.R.Civ.P. 6(a); Fed.R.Civ.P. 6(e); Fed.R.Crim.P. 45(a); Fed.R.Crim.P. 45(e), unless a different time is prescribed by the Magistrate Judge or a Judge, any party may file an original and one copy with the Clerk, and on all parties, written objections to such proposed findings and/or recommendations to which objection is made and the basis for the objection.

Supreme Court, U.S.
FILED
MAR 8 1999
OFFICE OF THE CLERK

No. 98-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELECTRIC ENGINEERING COMPANY,

Petitioner,

vs.

CALPINE CORPORATION; WILLIAM B. BETCHART; ENERVEST CORPORATION and ENERVEST MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CALPINE CORPORATION AND WILL B. BETCHART

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QUESTIONS PRESENTED

ISSUE I

Did the Ninth Circuit abuse its discretion in affirming a sanctions order applying established law to a detailed factual record?

ISSUE II

Must this Court exercise its power of supervision because the Ninth Circuit found to be frivolous EEC's argument that twenty days means thirty-one days?

LIST OF PARTIES

The Petition lists most of the parties to the proceeding.

Calpine Corporation is a respondent. It has no parent companies and no nonwholly owned subsidiaries.

Will B. Betchart is a respondent. Mr. Betchart was an employee of Calpine Corporation.

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TABLE OF CITED AUTHORITIES

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Cases:

Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019 (1991) 3, 5, 6, 7, 8

Comstock v. Group of Investors, 335 U.S. 211, 68 S. Ct. 1454, 92 L. Ed. 1911 (1948) 8

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S. Ct. 370, 57 L. Ed. 530 (1909) 11

Harrigan v. Mason & Winograd, Inc., 397 A.2d 514 (R.I. 1979) 11

Hovey v. Elliot, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897) 9

Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987), *cert. denied*, 488 U.S. 819, 109 S. Ct. 59 (1988) 8

Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) 10

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RESTATEMENT OF THE CASE

A. Introduction.

Petitioner Electric Engineering Company ("EEC") asks this Court to exercise supervisory power over the Ninth Circuit, arguing that the Ninth Circuit has far departed from the accepted and usual course of judicial proceedings. EEC asserts no other basis for this Court's jurisdiction. EEC challenges a Ninth Circuit opinion affirming dismissal of EEC's claims under FRCP 37, claiming that the lower courts unjustly punished EEC.

EEC misrepresents the proceedings below and the lower courts' rulings. No one unjustly punished EEC. Instead, the lower courts sanctioned EEC because of the courts' concern for the truth. In fact specific rulings, applying established precedent, the lower courts determined that EEC's conduct made the assessment of truth impossible, so that dismissal was the only remedy.

EEC's conduct included repeated violations of court orders, destruction of evidence, concealment of evidence, and false testimony about evidence, both by EEC and its counsel. Among other things, EEC and its attorneys concealed the Carroll memorandum, a critical piece of evidence which the Ninth Circuit called a "smoking gun." EEC's conduct prejudiced all parties to the litigation, including respondents Calpine Corporation and Will B. Betchart (collectively "Calpine"), as well as the Court.

B. EEC's Conduct.

In its opinion, the Ninth Circuit discussed EEC's conduct. Calpine will summarize significant findings.

> Electric Engineering had committed many discovery violations. The most critical had to do with hiding the [Carroll memorandum]. (Pet. App. 10a.)
>
> . . .
>
> For more than two years, Electric Engineering's lawyers violated court orders by failing to produce it. Several trial date settings had to be vacated because the discovery was incomplete. Warnings were given and monetary sanctions were imposed as Electric Engineering violated one court order after another. (Pet. App. 11a.)
>
> . . .
>
> The facts of the case at bar show dishonesty, not just recalcitrance and delay, regarding production of critical evidence.
>
> The Carroll memorandum was exceedingly important, as we have explained. It destroyed Electric Engineering's claim. . . . There was plenty of evidence that Electric Engineering, not just its lawyers, was doing its best to hide the memorandum. . . . (Pet. App. 17a.)

C. EEC Mischaracterizes the Magistrate Judge's Rulings.

1. The ruling on Credit Suisse's motion for sanctions.

EEC sued Calpine and Credit Suisse. Its claims against both were essentially the same. Credit Suisse made a motion for sanctions against EEC and its surety, American Home. The Magistrate Judge held two days of hearings. As the Ninth Circuit

found, he made a "meticulous analysis of all the evidence." (Pet. App. 11a.)

After the hearing, the Magistrate Judge issued findings and recommendations. He found that EEC and American Home had shared litigation interests. He noted past orders compelling EEC to comply with discovery, as well as issuance of substantial monetary sanctions against EEC. He found that EEC had willfully concealed the Carroll memorandum and willfully disobeyed earlier court orders.

The Magistrate Judge also reviewed notes prepared by American Home's counsel in a conversation with EEC's attorney. American Home's attorney had to produce the notes after the Court found a waiver of privilege. The notes referred to the Carroll memorandum. Before producing the notes, American Home's attorney obliterated the reference to the Carroll memorandum, but an expert later uncovered the reference. This was after testimony under oath by American Home's attorney, EEC's attorney, EEC's president, and Mr. Carroll denying any knowledge of the memorandum. The Magistrate Judge found the testimony to be "not credible."

The Magistrate Judge recommended as a sanction dismissal of EEC's claims. Before doing so, he considered the five factors identified in *Adriana International Corporation v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). He specifically considered, but rejected, imposition of a lesser sanction. He did not recommend his sanction to "unjustly punish" EEC. Instead, he recommended the sanction because of his concern for the truth. As the Magistrate wrote,

> EEC's conduct in the litigation has cast such a pall over EEC's integrity and upon a fair and just resolution on the merits that no alternative sanction

> could be effective. . . . [I]f the case were allowed to proceed, because of EEC's past conduct in this matter there could never be reasonable confidence that the merits had ever been fairly decided. (Pet. App. 66a.)

2. The ruling on Calpine's motion for sanctions.

Calpine asked the Magistrate Judge to extend the sanctions in Calpine's favor. The parties briefed and argued the issue, and the Magistrate recommended extending the sanction in favor of Calpine. He noted that the claims made by EEC against Calpine were essentially the same as the claims made against Credit Suisse, and it would not be just to allow EEC to continue to assert them against any party. He also found that American Home, acting in active concert with tacit agreement of EEC, destroyed the existence of the Carroll memorandum. The Magistrate Judge's findings and recommendations concluded with the following sentence: "Any party may file written objections to these findings and recommendations . . . within 20 days after service." (Pet. App. 39a.)

D. EEC Mischaracterizes Calpine's Involvement.

In the "undisputed facts" section of its petition, EEC describes Calpine's involvement in the litigation. Most of the facts listed are indisputably false.

EEC is correct that Calpine served EEC with a request for production of documents on July 9, 1991, but is incorrect when it asserts that EEC timely responded. EEC did not produce documents until February 4, 1992, seven months after the date of the request, when EEC's former counsel dumped five boxes of files in the office of Calpine's counsel. EEC's new counsel retrieved the documents on March 27, 1992, but before

Calpine's counsel reviewed them. As Calpine's counsel advised EEC's counsel, "I have not yet had the chance to review the documents, and I would like access to them again after your review." EEC later produced its documents, but without the Carroll memorandum. As the Ninth Circuit noted, "[o]nce the memorandum was in Electric Engineering's discovery materials retrieved by [new counsel], someone had to take the affirmative step of pulling it out."

Calpine actively participated in discovery in the case. It served multiple sets of requests for production of documents and interrogatories, both before and after delivery of EEC's documents to EEC's new counsel. Its attorney spent several weeks in depositions. Calpine also obtained an order compelling EEC to respond to Calpine's discovery.

E. EEC Mischaracterizes the District Court's Order.

The District Judge independently conducted a careful review of the Magistrate Judge's findings and recommendations. Responding to EEC's objections, he found that the weight of the evidence supported the finding that EEC deliberately suppressed the Carroll memorandum. He found concerted action by EEC and American Home to obliterate evidence and attempt to hide the memorandum. He also found that the memorandum undermined all of EEC's claims. Though Calpine's counsel had the memorandum, he returned EEC's documents before he had a chance to read them, understanding that he would get the documents back. When the documents were later produced, the Carroll memorandum was conspicuously absent.

The District Judge also considered the five *Adriana* factors, noting that the key factors "are fact sensitive." He specifically reviewed prejudice to the other parties and the availability of

less drastic sanctions, and determined that dismissal of EEC's claims was appropriate. He did not order dismissal to punish EEC. Instead, he found the Magistrate's determination a perfect expression of risk to the parties and the Court:

> [I]f the case were allowed to proceed, because of EEC's past conduct in this matter there could never be reasonable confidence that the merits had ever been fairly decided. (Pet. App. 66a.)

F. EEC Misrepresents the Ninth Circuit's Opinion.

EEC argues that the Ninth Circuit's affirmance was nothing more than unjust punishment. EEC concedes that sanctions are appropriate to advance ascertainment of truth, but not merely to punish an offending party. EEC also argues that the Ninth Circuit failed to consider the *Adriana* factors, and did not specify why it deemed EEC's appeal frivolous. EEC is wrong on all three points.

First, the Ninth Circuit affirmed because of its concern for the truth. In the Court's own words,

> There is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result. Sometimes, [cite], a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts. The District Court found that to be so in this case. (Pet. App. 19a.)
>
> . . .
>
> It took years to shake loose the Carroll memorandum. . . . Considering how Electric

> Engineering acted regarding the Carroll memorandum, it was a reasonable inference that if there was other discoverable material harmful to its case that its adversaries did not know about, it would be hidden forever. Where a party so damages the integrity of the discovery process there could never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate. It was on this record. (Pet. App. 20a.)

Second, the Ninth Circuit specifically considered each of the five *Adriana* factors. It noted that the Magistrate Judge and District Judge also expressly considered those factors. Reviewing the less drastic sanction factor, the Court noted:

> While contumaciousness toward the court needs a remedy, something other than case-dispositive sanctions will often suffice. Dismissal is appropriate where a "pattern of deception and discovery abuse made it impossible" for the district court to conduct a trial "with any reasonable assurance that the truth would be available." (Pet. App. 19a.)

Finally, the Court specified how EEC's appeal was frivolous. It noted that the Magistrate Judge provided in his written order that any party could file objections within 20 days after service. Service was April 22, but the objections were not filed until May 20, which was late. Reviewing EEC's argument that 20 days means 31 days, the Court found the argument to be frivolous. (Pet. App. 21a.) EEC makes the same frivolous argument in its petition.

REASONS FOR DENYING THE WRIT

I.

THIS COURT NEED NOT SUPERVISE THE NINTH CIRCUIT, WHICH HAS NOT FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

EEC asks this Court to exercise supervisory power over the Ninth Circuit, arguing that the Ninth Circuit has far departed from the accepted and usual course of judicial proceedings. EEC asserts no other basis for this Court's jurisdiction. As discussed below, there is no reason for this Court to grant certiorari.

A. The Ninth Circuit Did Not Abuse its Discretion in Affirming the Sanctions Order Where it Applied Established Law to a Detailed Factual Record.

In affirming terminating sanctions, the Ninth Circuit relied on established precedent including *Malone v. United States Postal Service*, 833 F.2d 128 (9th Cir. 1987), *cert. denied*, 488 U.S. 819, 109 S. Ct. 59 (1988) and *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1019 (1991). The Ninth Circuit carefully applied the factors developed in these cases to the detailed factual record at hand.

This Court will not usually review a finding of fact concurred in by both courts below. *Comstock v. Group of Investors*, 335 U.S. 211, 213-14, 68 S. Ct. 1454, 92 L. Ed. 1911 (1948). In this case, the magistrate judge, the district court, and the Ninth Circuit all found that EEC's action in withholding crucial evidence warranted terminating sanctions. The

Restatement of the Case above sets out the findings of the courts below in more detail.

The Ninth Circuit reviewed the dismissal under Rule 37 for abuse of discretion and reviewed the district court's factual findings for clear error. Reviewing the issue of willfulness, the court found "ample support [in the record] for the conclusions reached by the magistrate judge and district court judge." In addition, reviewing EEC's challenge to the appropriateness of the Rule 37(b) sanction, the court found that case dispositive sanctions were appropriate on this record "[w]here a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts."

Contrary to EEC's misstatements of fact, the magistrate judge, the district judge, and the Ninth Circuit all found that EEC's actions met the standard of willfulness, fault, or bad faith. The magistrate judge found that EEC had willfully concealed crucial evidence and had willfully disobeyed earlier court orders. The district judge found that EEC deliberately suppressed crucial evidence and was involved in hiding and obliterating evidence. The Ninth Circuit found dishonesty regarding production of critical evidence. EEC's claims of abuse of discretion are simply not supported.

EEC claims that the Ninth Circuit's affirmance as to Calpine and Enervest can only be seen as an attempt to unjustly punish EEC. EEC is correct that there are constitutional limits on the powers of the courts to impose sanctions for failure to comply with judicial orders. If the power of the court is used merely to punish an offending party for contempt, rather than compel obedience to an order advancing ascertainment of the truth, due process is denied. *Hovey v. Elliot*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897).

In this case, despite EEC's misstatements, the power of the court was not used simply to punish EEC for contempt. It was precisely the concern for finding the truth that led the district court to impose the dismissal sanction. Similarly, the Ninth Circuit found that EEC had so damaged the integrity of the discovery process that there never could be assurance of proceeding on the true facts. It was the ascertainment of truth that concerned the courts below, not mere punishment.

EEC cites a trilogy of cases, including *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) in support of its unjust punishment and due process claims. However, this Court's ruling in *Societe* in no way conflicts with the Ninth Circuit's affirmance of dismissal sanctions in this case. This Court in *Societe* found a violation of due process when a party was penalized for its failure to comply with a production order where the failure to comply "was due to inability fostered neither by its own conduct nor by circumstances within its control." In *Societe*, Swiss law prohibited the production of the records ordered. This Court stated that:

> Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to the *inability, and not to willfulness, bad faith, or any fault of the petitioner.*

Societe, 357 U.S. at 212, 78 S. Ct. at 1096 (emphasis added).

In this case, EEC made no showing of any inability to comply with the order compelling production. EEC was able to comply; it refused to comply. In fact, EEC's actions were

like the actions in *Hammond Packing,* cited by EEC, where this Court found no violation of due process where a party was able to comply with a production order, but failed to do so. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 57 L. Ed. 530 (1909).

EEC further claims that the unjust punishment and violation of its due process rights "is true . . . especially where EEC committed *no violation vis-à-vis* Calpine, Betchart, and Enervest." However, as indicated in the Restatement of the Case above, EEC's assertions regarding lack of prejudice to Calpine are simply wrong. Calpine actively participated in discovery of the case. The courts below all found that EEC's conduct prejudiced all parties to the litigation, including Calpine.

EEC claims the district court erred in dismissing as to parties who did not file a motion for sanctions, citing a Rhode Island case that states that "a dismissal of a plaintiff's claim . . . as to defendants who have not sought such relief is improper and unauthorized." *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 517 (R.I. 1979). Here, Calpine and Enervest petitioned the district court to extend the terminating sanctions in their favor, as well as Credit Suisse's. Thus, the district court did in fact grant relief only to those parties who specifically requested it, and it expressly dismissed EEC's claims as to Calpine and Enervest.

Established law and the detailed factual record clearly show that EEC was not unjustly punished, nor were its due process rights violated, either in the district court or in the Ninth Circuit. There is no error or question of importance requiring review by this Court.

B. The Ninth Circuit Correctly Found to be Frivolous EEC's Argument That 20 Days Means 31 Days.

In its appeal to the Ninth Circuit, and in its petition to this Court, EEC argues that 20 days means 31 days. The Ninth Circuit found this argument to be frivolous. EEC argues that this finding justifies this Court's jurisdiction.

EEC devoted half a page of its petition to a conversation between the Magistrate Judge and EEC's counsel. They discussed the time within which EEC must file objections to the Magistrate Judge's findings and recommendations. EEC's petition fails to disclose that the Magistrate Judge later issued a written order, stating that any "party may file written objections to these findings and recommendations . . . within 20 days after service." (Petitioner's Appendix 39a.)

As the Ninth Circuit found,

> Service was April 22, but the objections were not filed until May 20, which was late. Electric Engineering argues that intermediate weekend days should be excluded because the 20 days should be viewed as two 10-day periods, and weekends are excluded from 10-day periods under Federal Rule of Civil Procedure 6(a). The argument is frivolous. Rule 6(a) says intermediate weekends are excluded "[w]hen the period of time prescribed or allowed is less than 11 days." Twenty is more than 11. Allowing the three days for service by mail pursuant to Rule 6(e), and the extra day if the last day is Sunday under Rule 6(a), opposition was due Monday, May 16. (Petitioner's Appendix 21a.)

Despite this obvious conclusion, EEC argues that its objections were actually due on May 26, 1994, 31 days after service (allowing three days for service by mail). The counting error of EEC's counsel certainly does not justify this Court's supervision over the Ninth Circuit.

C. EEC's Misstatements of the Factual Record in Its Petition, Standing Alone, Warrant the Court's Denial of the Petition.

The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition. Rule 14(4). As detailed in the Restatement of the Case above, petitioner's misstatements of the factual record alone warrant denial of the petition.

CONCLUSION

The Court should deny EEC's petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELECTRIC ENGINEERING COMPANY,

Petitioner,

vs.

CALPINE CORPORATION; WILLIAM B. BETCHART; ENERVEST CORPORATION and ENERVEST MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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EEC COMMITTED NO VIOLATIONS OF DISCOVERY AS TO RESPONDENTS CALPINE OR ENERVEST, WHEREFORE THE TERMINATING SANCTIONS AS TO THEM WERE UNWARRANTED, UNAUTHORIZED BY THE RULES OF PROCEDURE, AND UNJUST PUNISHMENT. ALSO, IT WAS REASONABLE FOR EEC'S COUNSEL TO CALCULATE 31 DAYS FOR FILING OBJECTIONS TO THE MAGISTRATE'S REPORT AWARDING SANCTIONS.

Smoke screen: 1. a cloud of smoke spread to screen the movements of troops, ships, etc. 2. anything said or done to conceal or mislead. *Webster's New World Dictionary of the American Language* (2d College ed. 1984).

Calpine's Brief In Opposition is nothing more than a "smoke screen", and this Court should re-read it with a few important facts in mind:

1) EEC provided full and complete responses to all of Calpine's requests for discovery. (Pet. App. 14a, 36a).

2) Calpine's counsel received and retained five boxes of original documents, including the notorious Carroll Memo, for several months, (Pet. App. 36a), and never looked at the documents; nor had an associate, law clerk, paralegal, or secretary look at the documents; nor had them photocopied. (Pet. App. 14a, 36a).

3) The sanctions initially entered against EEC were for alleged failure to respond to discovery propounded by Credit Suisse, not Calpine; nor did Calpine play any role in Credit Suisse's discovery or motion for sanctions.

4) Enervest never propounded any discovery at all.

5) Respondent's present counsel is the same who received the boxes of original documents from EEC and failed to review them; therefore, his personal stake in the outcome of this petition clouds his perceptions as well as his presentation of the facts.

MISLEADING RESTATEMENT OF THE CASE

In carefully couched language, Respondent misstates the facts of this case and attempts to mislead this Court.

> a) "[The Magistrate Judge] noted past orders compelling EEC to comply with discovery, as well as issuance of substantial monetary sanctions against EEC. He found that EEC had willfully concealed the Carroll memorandum and willfully disobeyed court orders."

(Brief In Opposition, p. 3).

There was, in fact, only one order compelling entered against EEC, which was the same order granting monetary sanctions against EEC. The seemingly numerous other orders referred to by Respondent were actually entered against American Home Assurance Company ("AHA").

> b) "He also found that American Home, acting in active concert with tacit agreement of EEC, destroyed the existence of the Carroll memorandum."

(Brief In Opposition, p. 4).

In fact, the Carroll Memo was never destroyed. The original was produced to Respondent Calpine in the five boxes delivered to counsel's office. (Pet. App. 14a, 36a). Also, a copy was produced to all parties prior to the hearing on Credit Suisse's Motion For Sanctions. (Pet. App. 13a).

> c) The five boxes of original documents, including the Carroll Memo, were produced to Calpine on "February 4, 1992", and picked up by EEC's new counsel on "March 27, 1992, but before Calpine's counsel reviewed them. As Calpine's counsel advised EEC's counsel, 'I have not yet had the chance to review the documents, and I would like access to them again after your review.' EEC later produced its documents, but without the Carroll memorandum."

(Brief In Opposition, pp. 4-5).

First, by his own admission, Respondent's counsel had nearly two months to review these documents but did absolutely nothing in that regard. Second, counsel brings a self-serving quote without any basis or record support; not even an appendix document to validate this alleged statement.

Third, in reference to EEC's later production of its documents, Respondent fails to disclose that it was in response to the discovery request of Credit Suisse. As already stated, Calpine played no role in Credit Suisse's discovery. Further, Calpine never requested that the documents be produced again.

> d) "Calpine actively participated in discovery in the case. It served multiple sets of requests for

> production of documents and interrogatories, both before and after delivery of EEC's documents to EEC's new counsel. Its attorney spent several weeks in depositions. Calpine also obtained an order compelling EEC to respond to Calpine's discovery."

(Brief In Opposition, p. 5).

Again, no support is offered for the misrepresentations here. Calpine's only other discovery consisted of a subpoena for production of records, a request to produce, and interrogatories, all directed solely to the determination of whether EEC had the proper contractor's license for the job for which it had contracted. Calpine never propounded any other discovery requests directed to the general litigation.

Whereas Calpine did at one point obtain an order compelling production against EEC; that order was satisfied.

> e) "Though Calpine's counsel had the memorandum, he returned EEC's documents before he had a chance to read them. . . . When the documents were later produced, the Carroll memorandum was conspicuously absent."

(Brief In Opposition, p. 5).

Respondent admits to having the five boxes of documents at least from February 4 through March 27, 1992. Respondent admits that the Carroll Memo was among those documents.

Now, incredibly, Respondent claims he did not have "a chance" to read them during the minimum two months they were in his possession.

Also, in true misleading style, Respondent fails to point out that "when the documents were later produced", it was in response to the discovery request of Credit Suisse. Calpine never asked for the five boxes back again.

> f) "EEC also argues that the Ninth Circuit failed to consider the Adriana factors, ... Second, the Ninth Circuit specifically considered each of the five Adriana factors. It noted that the Magistrate Judge and District Judge also expressly considered those factors."

(Brief In Opposition, pp. 6-7).

EEC never argued that the lower tribunals failed to consider the five factors set forth in *Adriana International Corporation v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990). In fact, each court did consider the factors as between EEC and Credit Suisse.

But EEC's contention, as set forth in its Petition, is that the lower tribunals failed to "independently" apply the *Adriana* factors to Calpine and Enervest each individually; parties against whom EEC committed no wrong. This error by the lower tribunals is readily apparent from review of their reports/orders/opinions which are attached as part of the Appendix to EEC's Petition.

ERRONEOUS REASONS FOR DENYING THE WRIT

Respondent also brings erroneous and misleading arguments in its Brief In Opposition.

a) Calpine asserts that the lower tribunals found "willfulness, fault, or bad faith" in EEC's failure to comply with

discovery. (Brief In Opposition, pp. 8-9). However, Calpine craftily omits the fact that EEC's alleged failure was regarding discovery propounded by Credit Suisse. Respondent Calpine, by its own admission, received full and complete responses to its discovery requests. EEC exhibited no "willfulness, fault, or bad faith" vis-a-vis Calpine.

b) Respondent's reliance on *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), is misplaced. (Brief In Opposition, p. 10). EEC never made a showing of any inability to comply with the order compelling production because, as to Calpine and Enervest, EEC fully responded to all discovery requests.

c) Respondent's reference to *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 517 (R.I. 1979), is also misleading. (Brief In Opposition, p. 11). Calpine and Enervest's petitions to extend the terminating sanctions in their favor came only after the recommendation of sanctions had been entered in favor of Credit Suisse. Without justification or right, Respondents wanted to ride the coattails of Credit Suisse in spite of their own indolence.

"20 DAYS" MAY REASONABLY MEAN "31 DAYS".

Calpine argues that EEC's interpretation that "20 days means 31 days" is frivolous. However, this argument is not frivolous, particularly when the Court recognizes that, under the Federal Rules of Civil Procedure, 10 days most definitely means at least 17 days. EEC would refer this Court to its Petition for comprehensive argument on this issue, particularly the discussion regarding the standard for a determination of "frivolousness". (Pet. pp. 17-21).

SUPREME COURT RULE 14(4)

It should be very clear, based upon the foregoing, that it is not EEC who has misstated the factual record, but rather Calpine who would misdirect and mislead this Court.

CONCLUSION

The issue of the propriety of sanctions entered against EEC in favor of Credit Suisse is not presented in this Petition. That matter has settled and is now moot.

However, the error in the sanctions granted to Calpine and Enervest is very much at issue; and, since EEC committed no violation as to these two parties, the sanctions can be nothing more than unjust punishment. Even the Ninth Circuit, when examining solely this issue, recognized the injustice in blaming EEC for Calpine's attorney's failure to take advantage of documents which sat in his office for "several months". (Pet. App. 71a-103a).

Respondent, like the lower tribunals, has painted with too broad a brush. By presenting its smoke screen, it attempts to mislead this Court into believing that any "sins" allegedly committed by EEC against Credit Suisse were automatically committed against Calpine and Enervest.

Just like the smoke screen, Respondent's facts and arguments are without substance, and it offers nothing in support but carefully calculated and self-serving words.

It is appropriate for this Court to review the issues of whether, how far, and under what circumstances sanctions may be extended to benefit uninjured parties. This Court should

establish some national guidelines in this matter since none presently exist.

This Court should grant the Petition for Writ of Certiorari, reverse the rulings below, remand for vacation of the terminating sanctions against EEC in favor of Calpine and Enervest, and order that this matter proceed to a full trial as to these parties.

Respectfully submitted,

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